The Unlawful Conduct Defense in Legal Malpractice

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I. TRADITIONAL REJECTION OF AN "OUTLAW" DOCTRINE

Not long ago, American tort law clearly rejected an "outlaw" doctrine: a plaintiff engaged in tortious or criminal acts was not treated as an outlaw who could be injured with impunity.[1] As this principle was expressed in the American Law Institute's *Restatement (Second) of Torts*: "One is not barred from recovery for an interference with his legally protected interests merely because at the time of the interference he was committing a tort or a crime. . . ."[2]

This was true regardless of whether the plaintiff's claim was based on intent, recklessness, negligence, or strict liability.[3] The plaintiff's unlawful conduct might give rise to a defense such as contributory or comparative negligence under ordinary tort principles,[4] or might trigger a privilege assertable

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[1] *See* Barker v. Kallash, 468 N.E.2d 39, 44 (N.Y. 1984) (Jasen, J., concurring) (stating that the "so-called 'outlaw' doctrine of tort law–*i.e.*, depriving a violator of the law of any rights against a tort-feasor–has long since been discarded by most, if not all, American jurisdictions. . . ." (Citations omitted)).

[2] RESTATEMENT (SECOND) OF TORTS § 889 (1979). Nevertheless, there is evidence that early American law did recognize some form of unlawful conduct defense. In *Barker*, 468 N.E.2d at 45, Judge Matthew Jasen wrote:

> [T]hese same principles of public policy were once elegantly expressed in another context by Justice Brandeis: "The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination."

(Jasen, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting)).

[3] *See* RESTATEMENT (SECOND) OF TORTS § 889 cmts. a, b (1979) (discussing intentional harm, recklessness, negligence, and liability for abnormally dangerous activities). The Restatement even rejected an outlaw doctrine between co-conspirators. *Id.* at § 889 cmt. c ("Although one is engaged in a criminal activity with another person, he is nevertheless entitled to recover for harm intentionally inflicted by his fellow conspirator, and this is true even though the harm arises out of and because of the crime that is being committed.").

[4] *Id.* at § 889 cmt. b ("Criminal conduct that by virtue of statutory interpretation or otherwise constitutes negligence or recklessness, is a defense to an action for harm caused by corresponding

against the plaintiff, such as one "to prevent crime or to arrest a criminal."[5] However, unlawful conduct, by itself, did not inevitably bar the courthouse doors.

Various cases allowed plaintiffs to sue for harm that they suffered while engaged in illegal gambling, fornication, doing unlicensed business, or while unlawfully present in the United States.[6] Other suits permitted recovery by persons injured while trespassing on another's property,[7] or while traveling unlawfully on Sunday[8] or in an unregistered vehicle.[9] Beyond American borders, other countries also eschewed an outlaw doctrine.[10]

The second *Restatement's* rejection of a rule making tortious or criminal conduct an absolute obstacle to recovery in tort was not surprising. The same position had been embraced four decades earlier by the first *Restatement*,[11] and the most respected legal commentators had renounced the contrary view. In their classic treatise on the law of torts, Fowler V. Harper and Fleming James, Jr., wrote that treating the "violator of penal statutes . . . as something of an outlaw . . . disentitled to seek redress through the courts for any injury to which his criminal conduct contributed . . . [was] a barbarous relic of the worst there was in puritanism."[12] The same reasoning was later endorsed by the eminent torts

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[5] *Id.* at § 889 cmt. a.

[6] *See id.* at § 889 Reporter's Note.

[7] In one famous case, Katko v. Briney, 183 N.W.2d 657 (Iowa 1971), a trespasser injured by a concealed spring gun on the defendant's property was allowed to recover compensation for harm intentionally inflicted via that mechanism. The court held that the plaintiff's deliberate violation of the law did not change the rule that deadly force cannot be used merely to protect property. *Katko* was controversial, but the decision was not unique in the principles it applied. *Katko* outraged many persons not merely because a lawbreaker was permitted to recover, but because the defendants had to sell a large part of their farm to pay the judgment. *See* Robert F. Bloomquist, *Re-Enchanting Torts*, 56 S.C. L. REV. 481, 501 n.149 (2005).

[8] *See* Carroll v. Staten Island R.R. Co., 1874 WL 11265, *6 (N.Y. 1874) ("The negligence of the defendant was as wrongful on Sunday as on any other day, and . . . [the] plaintiff's unlawful act did not in any sense contribute to the explosion.").

[9] *See* Armstead v. Lounsberry, 151 N.W. 542, 544 (Minn. 1915) ("The right of a person to maintain an action for a wrong committed upon him is not taken away because he was at the time of the injury disobeying a statute law which in no way contributed to his injury.").

[10] *See* Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 211 n. 203 (2006) (discussing the UK and stating "the law does not allow even a criminal who has committed a serious offence to be deprived of all his or her rights under either the civil or criminal law. This would amount to outlawry, and this has quite clearly, and in our view rightly, been rejected by the courts." (citing The Law Commission, Consultation Paper No. 160: The Illegality Defence in Torts 77, 77-78 (2002))).

[11] *See* RESTATEMENT (FIRST) OF TORTS § 889 (1939).

[12] FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 17.6, 995-97 (1956) (adding that the outlaw doctrine "could be justified at all only as a stringent means of imposing additional sanctions to enforce a very important provision of the criminal law, and [that] it is questionable indeed whether it is wise for the court to assume the responsibility of imposing such a sanction when the legislature has not seen fit to do so"). *See also id.* at 1005 (referring to the "outlaw theory"); Fleming James, Jr., *Contributory Negligence*, 62 YALE L.J. 691, 700 (1953) (describing

scholar Oscar S. Gray.[13] The co-authors of the Prosser treatise–perhaps the single most influential law book of the twentieth century[14]–dismissed the outlaw theory as nonviable, stating that "the courts have long since discarded the doctrine that any violator of a statute is an outlaw with no rights against anyone."[15]

Much has changed in American tort law during the past thirty years,[16] including the rules relating to unlawful conduct.[17] Today, in an important range of cases, statutes and court decisions, in many states, now provide that injuries arising from the plaintiff's serious unlawful conduct are not compensable under tort law.[18] For example, the New York Court of Appeals has ruled that: "[W]hen the plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff's conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation."[19]

Legal malpractice law now recognizes an outlaw doctrine in a variety of guises. Most notably, in a majority of states, a convicted criminal cannot recover for legal malpractice related to his or her defense without obtaining reversal of the conviction or, in some jurisdictions, proving factual innocence of the offense.[20] However, there are other legal rules which seize on the plaintiff's

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the "outlaw theory" as "largely discredited" and "indeed a fairly accurate reflection of some such notion as an insistence on clean hands" which "shows its unacceptable harshness").

[13] *See* FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, THE LAW OF TORTS § 17.6, 616-18 (2d ed. 1986).

[14] *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 6 (3d ed. 2005) (discussing the book's legendary status). *See also* Craig Joyce, *Keepers of the Flame: Prosser and Keeton on the Law of Torts (5th Edition) and the Prosser Legacy*, 39 VAND. L. REV. 851, 852-53 (1986) (discussing the Prosser legacy).

[15] W. PAGE KEETON, DAN D. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 232 (5th ed. 1984).

[16] *Cf.* JOHNSON & GUNN, *supra* note 14, at 5 (discussing repeated efforts to reform the law of torts in recent decades); Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. L. REV. (China) 237, 245-46 (2000) (hereinafter "*Tort Law in America*") (discussing efforts aimed at "turning back the clock" to "a time when American tort plaintiffs were often denied compensation for injuries and when tort law did little to create incentives for safety.").

[17] *Compare* Zysk v. Zysk, 404 S.E.2d 721, 721 (Va. 1990) (barring the plaintiff from recovering damages for herpes contracted during participation in the crime of fornication with the defendant), *with* Long v. Adams, 333 S.E.2d 852, 855 (Ga. Ct. App. 1985) (contrary holding).

[18] *See infra* Part II. *But see* Goldfuss v. Davidson, 679 N.E.2d 1099, 1104 (Ohio 1997) (per Moyer, C.J., with two judges concurring, and three judges concurring in judgment only) (holding, in an action based on the allegedly negligent shooting of a trespasser, that public policy does not preclude recovery for injuries sustained during the commission of a felony).

[19] *Barker*, 468 N.E.2d at 41 (holding that a fifteen-year-old boy who was injured while constructing a "pipe bomb" was precluded from recovering from the nine-year-old boy who supplied the gunpowder). *But see* Flanagan v. Baker, 621 N.E.2d 1190, 1192-93 (Mass. App. Ct. 1993) (holding, on facts "almost identical" to those in *Barker*, that even if the Massachusetts comparative negligence statute allowed negligence actions by certain lawbreakers to be barred for public policy reasons, the plaintiff child's action was not barred on that basis).

[20] *See infra* Part III.A. Of course, unlawful conduct can also create an obstacle to recovery in contract. A malpractice claim is often met with a counterclaim for unpaid fees that the plaintiff

unlawful conduct as an insuperable obstacle to recovery for legal malpractice. Rulings deny relief from errant attorneys under the rubric of *in pari delicto,*[21] unclean hands,[22] and even proximate causation.[23] Other cases,[24] discussed below,[25] have held that an "insider fraud" defense may preclude a legal malpractice action on behalf of a corporate entity.[26]

There are questions as to how far the unlawful conduct defense extends. Suppose, for example, that a client is held *civilly liable* to investors for fraud, but never subject to criminal prosecution. Is a malpractice claim against the lawyer who provided legal representation related to those fraudulent activities barred by the fact that, at the time of the alleged malpractice, the client was engaged in serious unlawful conduct? On various rationales, a number of courts have answered that question in the affirmative on similar facts.[27] In a typical passage, one court wrote:

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owes the defendant law firm. In one such case, the California Supreme Court held that a New York law firm's unauthorized practice of law in California barred enforcement of its fee agreement with respect to legal services performed in California. *See* Birbrower, Montalbano, Condon & Frank, P.C. v. Super Ct. of Santa Clara County, 949 P.2d 1 (Cal. 1998). So too, in some states, a contract procured by improper client solicitation is unenforceable. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 787 (1986); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT R. 7.03(d) (2007) (providing that "a lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation" of the Texas anti-solicitation rules).

[21] *See infra* Part III.B.

[22] *See infra* Part III.C.

[23] *See infra* Part III.E.

[24] *See* FDIC v. Ernst & Young, 967 F.2d 166, 171-72 (5th Cir. 1992) (allowing an insider fraud defense); Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709 (Bankr. S.D.N.Y. 2001) (holding that a trustee could not "sue third-party professionals [attorneys and accountants] for allegedly aiding and abetting corrupt management in a scheme to defraud the debtor corporation. . . .").

[25] *See infra* Part III.D.

[26] *See generally* David B. Newdorf, *Inside Fraud, Outside Negligence and the Savings and Loan Crisis: When Does Management Wrongdoing Excuse Professional Malpractice*, 26 LOY. L.A. L. REV. 1165 (1993).

[27] *See* Shahbaz v. Horwitz, 2008 WL 808034, *9-*10 (Cal. Ct. App. Mar. 27, 2008) (holding that a client who fraudulently induced a third party to enter into an agreement could not establish proximate causation in a legal malpractice claim against a law firm that assisted the transaction because, as a matter of public policy, the client was precluded from shifting responsibility for his intentional wrongdoing to his attorneys, even if the attorneys drafted the agreement negligently); Mettes v. Quinn, 411 N.E.2d 549, 551 (Ill. Ct. App. 1980) (holding, in a suit where an attorney's allegedly negligent advice caused the plaintiff's fraud to be discovered, that no relief was available because the courts "will not aid a fraudfeasor"). *See also In re* Gosman, 382 B.R. 826, 837-38 (Bankr. S.D. Fla. 2007) (stating that a legal malpractice action was barred under the doctrine of *in pari delicto* where a client engaged in fraud, but the attorney was merely negligent); Heyman v. Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 994 P.2d 92, 94 (Okla. Civ. App. 1999) (holding that where a final judgment established that a law firm's clients had committed fraud against their partners, no legal malpractice action could be maintained based on the firm's allegedly negligent drafting of an agreement between the clients and their partners or the firm's representation of the clients at trial; "[i]t would be contrary to public policy to allow the Clients

> Having been held personally liable for fraud, [the client] is barred from suing his former attorney for damages based on either malpractice . . . or breach of fiduciary duty . . . in the advice that allegedly underlay [the client's] actions. Courts have held that those who knowingly have engaged in fraudulent behavior may not subsequently maintain suit against their (former) professional advisors. [28]

Taking into account the various rationales for denying relief, it is plain that there is an unlawful conduct defense—or what some have called a "wrongful-conduct defense"[29] or "serious misconduct bar"[30]—which sometimes precludes recovery in a legal malpractice action. However, the contours of that obstacle to suit are quite unclear.[31]

Courts are in disagreement as to both the requirements of the unlawful conduct defense and whether the plaintiff or the defendant bears the burden of proof. These are vital questions, for what is at stake is the closing of courthouse doors to clients who have allegedly been victimized by the misconduct of attorneys who were duty-bound to protect their interests through the exercise of care and loyalty.

It makes a world of difference, both to the individual litigant and to the fairness of the justice system, whether unlawful conduct is treated as an affirmative defense on which the defendant bears the burden of proof, as opposed to an aspect of proximate causation that precludes a plaintiff from establishing a *prima facie* case. So too, it is tremendously important to define what types of criminal or tortious conduct trigger the defense, how closely that conduct must be related to the legal malpractice for which recovery is sought, and how convincingly the plaintiff's default must be established. It is one thing to bar a cause of action based on the plaintiff's prior criminal conviction established by proof beyond a reasonable doubt, another thing to rely on an earlier civil judgment established by a preponderance of the evidence, and something else to allow allegations of criminal or tortious conduct to be adjudicated for the first time as part of the plaintiff's legal malpractice case.

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here to benefit from their own confirmed fraud and recover a monetary judgment from the Firm to indemnify them for their fraud.").

[28] Maxwell v. Stein, 1993 W.L. 512907, *3 (S.D.N.Y. Dec. 3, 1993). Maxwell was found guilty of perpetrating fraud on investors in a civil action filed in federal court by the Commodity Futures Trading Commission. *Id.* at *1-*2. Maxwell pled guilty in New Jersey state court to one count of selling an unregistered security. *Id.* at *2.

[29] *See* Gragg v. Auburn Counseling Assocs., Inc., 2002 WL 1375746, *2 (Mich. App. June 25, 2002) ("The wrongful-conduct rule provides that a plaintiff cannot maintain an action if the cause of action is based, in whole or in part, on his own illegal conduct.").

[30] *See* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1016 (2002) (offering a comprehensive history, description, and critique of the doctrine).

[31] *See* Heyman v. Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 994 P.2d 92, 95 (Okla. Civ. App. 1999) (Stubblefield, J., concurring in result) (noting, in a suit raising the question of whether clients' fraud against third persons barred a malpractice action against the clients' attorneys, that "there is little discoverable authority purporting to determine such cases on the basis of public policy.").

Judicial recognition of a generally applicable unlawful conduct defense in legal malpractice law could have a tremendous impact on many disputes, including the viability of efforts by corporate clients and their successors, such as bankruptcy trustees,[32] to recoup from law firms the costs of corporate wrongdoing.[33] During the past two decades, that kind of claim has been a major theme in the lawsuits that followed the savings and loan crisis[34] or the collapse of major businesses such as Enron.[35] Today, such claims are increasing in number.[36]

This article explores whether there is a sound legal basis for a general unlawful conduct defense in legal malpractice cases and whether recognition of such a defense would be a desirable development in this area of the law. Part II begins by examining the recent emergence of the unlawful conduct defense in areas of tort law not necessarily involving legal malpractice, including statutes passed in a number of jurisdictions, related decisions, and opinions recognizing the defense as a matter of common law. This broad perspective is useful because in many respects the law of lawyer liability is not an independent construct

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[32] *See, e.g.*, Douglas v. Delp, 987 S.W.2d 879, 882 (Tex. 1999) (holding that once a party with a legal malpractice claim declares bankruptcy, the trustee of the bankruptcy estate is the only party with standing to pursue the claim). *See also* Anthony Lin, *News in Brief*, N.Y.L.J., Feb. 17, 2006, at 1 (reporting that Paul, Weiss, Rifkind, Wharton & Garrison "agreed to pay part of a $180 million settlement of claims arising from the 1998 bankruptcy of Boston Chicken Inc." in a suit by the company's court-appointed bankruptcy trustee).

[33] *See also In re Gosman*, 382 B.R at 838 (barring a legal malpractice suit by a trustee in bankruptcy based on the debtor's fraud).

[34] *See* Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW. 1387, 1394 (2003) (stating that "[t]he collapse of real estate and energy prices in the late 1980s resulted in massive failures of savings and loan associations. Federal agencies relentlessly attempted to hold law firms and accounting firms responsible for losses."); Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 331-32 (1995) (indicating that "[i]n at least six . . . actions brought in connection with failed savings and loan associations, the government . . . alleged that each law firm partner [was] personally liable for failing to monitor the conduct of other firm partners."); Cory M. Martin, *Pogo, Esq. Views FIRREA: "We Have Met the Enemy and They are Us" (A Litany of Law Firm Defendants, Cases, and Settlements)*, 4 No. 1 LEGAL MALPRACTICE REP. 18, 18-20 (1993) (discussing lawsuits against lawyers caused by savings and loan institution failures); *The Hall of Blame: Law Firms Cited in Liability Cases*, 12 No. 3 OF COUNSEL 9 (1993) (discussing "firms sued for representing Lincoln Savings and Loan Association"); Newdorf, *supra* note 26, at 1166 (discussing the "unprecedented number of malpractice suits" seeking to hold attorneys and accountants liable for losses at corrupt savings and loan associations).

[35] *Cf.* GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, & JOHN S. DZIENKOWSKI, THE LAW OF LAWYERING § 4.8 (3d ed. 2006) (predicting malpractice lawsuits in the wake of Enron and other corporate scandals).

[36] *See* Amanda Bronstad, *Firms Fend Off More Malpractice Actions*, NAT'L L.J. ONLINE, Mar. 31, 2008 at 1 (reporting that "an increasing number of [malpractice] suits are being filed by the trustees overseeing the bankruptcy of a law firm's client.").

unrelated to basic tort rules, but an evolving set of standards animated to a great extent by the principles and policies that have evolved in other areas of tort law.[37]

Part III considers decisions holding that some types of unlawful conduct preclude a legal malpractice action. The discussion focuses, first, on the exoneration or innocence requirement that many states now impose on malpractice claims by criminal defendants; second, on the *in pari delicto* defense; third, on the unclean hands defense; fourth, on decisions, including some in the corporate context, indicating that fraud on the part of the plaintiff is a complete defense to a malpractice action; and fifth, on cases treating unlawful conduct as an aspect of proximate causation.

Finally, Part IV addresses the appropriateness of an all-or-nothing unlawful conduct defense in the current age of comparatives principles. The discussion explores those considerations that should limit and shape future development of the unlawful conduct defense in the legal malpractice context.

II. THE RISE OF THE UNLAWFUL CONDUCT DEFENSE IN AMERICAN TORT LAW

A. Statutory Defenses

A number of states have enacted statutes which foreclose lawsuits seeking damages for injuries resulting from serious unlawful conduct. These laws hearken back to harsh common law rules, which, at various times in Anglo-American history, have denied legal protection to an "outlaw."[38] Some of the new laws are short and elegant. One California statute, enacted by a voter initiative,[39] provides simply that, "In any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony."[40] Similarly, an Ohio statute provides that:

> Recovery on a claim for relief in a tort action is barred to any person or the person's legal representative if the person has been convicted of or has pleaded guilty to a felony, or to a misdemeanor that is an offense of violence,

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[37] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 (2000) (providing that whether a lawyer's breach of a duty of care or breach of a fiduciary duty was a legal cause of injury is "determined under generally applicable principles of causation and damages").

[38] *See* King, *supra* note 30, at 1014-18 (tracing the history of denying legal protection to outlaws as far back as the twelfth century).

[39] *See* Quackenbush v. Super. Court, 70 Cal. Rptr. 2d 271, 273-74 (Cal Ct. App. 1997) (indicating that "[o]n November 5, 1996, the voters approved Proposition 213, the Personal Responsibility Act of 1996, adding sections 3333.3 and 3333.4 to the Civil Code, applicable to trials commencing after January 1, 1997," and holding those provisions to be constitutional). Section 3333.4 is discussed below in note 69.

[40] CAL. CIV. CODE § 3333.3 (West 2008).

> arising out of criminal conduct that was a proximate cause of the injury or loss for which relief is claimed in the action.[41]

Other state laws are more detailed. For example, an Alaska statute addresses with great specificity the types of criminal activity that give rise to an unlawful conduct defense, the significance of pleas of guilty or *nolo contendre*, and how the rule operates in cases where there has been no prior conviction.[42]

Statutes creating an unlawful conduct defense are animated by a common theme. They seek to punish persons who have engaged in serious wrongdoing by curtailing their rights to sue for damages and preventing them from shifting responsibility for their anti-social conduct.[43] The text of the Proposition that led to the enactment of the California law quoted above[44] included a blunt statement

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[41] OHIO REV. CODE ANN. § 2307.60(B)(2) (West 2008).

[42] ALASKA STAT. § 09.65.210 (2008). Section 09.65.210 provides:

> A person who suffers personal injury or death or the person's personal representative . . . may not recover damages for the personal injury or death if the injury or death occurred while the person was
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> (1) engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the felony substantially contributed to the personal injury or death;
>
> (2) engaged in conduct that would constitute the commission of an unclassified felony, a class A felony, or a class B felony for which the person was not convicted and the party defending against the claim proves by clear and convincing evidence
>
> (A) the felonious conduct; and
>
> (B) that the felonious conduct substantially contributed to the personal injury or death;
>
> . . .
>
> (4) operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance in violation of AS 28.35.030, was convicted, including conviction based on a guilty plea or plea of nolo contendere, and the party defending against the claim proves by clear and convincing evidence that the conduct substantially contributed to the personal injury or death; or
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> (5) engaged in conduct that would constitute a violation of AS 28.35.030 for which the person was not convicted if the party defending against the claim proves by clear and convincing evidence
>
> (A) the violation of AS 28.35.030; and
>
> (B) that the conduct substantially contributed to the personal injury or death.

[43] Similar statements have been made by courts discussing common law versions of the unlawful conduct defense. *See, e.g.*, Rimert v. Mortell, 680 N.E.2d 867, 873 (Ind. Ct. App. 1997) (stating that the "prohibition against actions based in whole or in part upon one's own criminal conduct is grounded upon the sound public policy that convicted criminals should not be permitted to impose or shift liability for the consequences of their own antisocial conduct"). *See also Barker*, 468 N.E.2d at 43 (stating that the defense "rests . . . upon the public policy consideration that the courts should not lend assistance to one who seeks compensation under the law for injuries resulting from his own acts when they involve a substantial violation of the law").

[44] *See supra* text accompanying note 40.

of findings and purpose, which obviously the voters found appealing. That statement read:

> Insurance costs have skyrocketed for those Californians who have taken responsibility for their actions. . . . [C]riminal felons are law breakers, and should not be rewarded for their irresponsibility. . . . However, under current laws, . . . criminals have been able to recover damages from law-abiding citizens for injuries suffered during the commission of their crimes. . . . Californians must change the system that rewards individuals who fail to take essential personal responsibility to prevent them from seeking unreasonable damages or from suing law-abiding citizens.[45]

One might conclude that the Proposition was intended to protect only "law-abiding citizens," persons who were blameless, innocent of fault. However, a subsequent case addressing the quoted language made clear that the initiative had a broader reach: "[l]aw abiding cannot and does not mean free of all blame. . . . In expressly barring negligence claims, the initiative presupposes that the defendants, in fact, may have been negligent."[46]

At least one state, more than a quarter century ago, passed legislation rejecting an outlaw doctrine with language paralleling the rule of the *Restatement (Second) of Torts*,[47] quoted above in the text.[48] That Massachusetts statute provides:

> The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.[49]

However, the recent trend is to the contrary.

In general, state statutes that bar a civil action for damages based on the plaintiff's own unlawful conduct vary in five important respects. Those variations concern: (1) the nature of the unlawful conduct that triggers the rule; (2) the theories of recovery that are barred; (3) types of damages that may not be recovered; (4) how closely the unlawful conduct must be related to the injuries for which recovery is sought; and (5) whether there must have been a prior adjudication of criminal responsibility.

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[45] 1996 Cal. Legis. Serv. Proposition 213 (West).

[46] Gage v. Network Appliance, Inc., 2005 WL 3214954, *4, *4 (Cal. Ct. App. 2005) (concluding that "nothing in the language of the initiative or the ballot materials reflects an intention on the part of the electorate to limit the term 'law-abiding citizens' to the victims of the plaintiff's crime.").

[47] *See* RESTATEMENT (SECOND) OF TORTS § 889 (1979).

[48] *See supra* text accompanying note 2.

[49] MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2008) (enacted in 1973 as part of the comparative negligence law).

1. Nature of Unlawful Conduct

Statutory versions of the unlawful conduct defense require proof of a serious criminal act. Typically, the act must be a felony,[50] or a particular type of felony.[51] However, in some cases, certain misdemeanors, such as "operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance,"[52] may suffice to foreclose relief in a civil cause of action.

In the overall scheme of things, some crimes, though denominated felonies, are based on relatively minor conduct,[53] such as theft of a small amount of money.[54] So too, criminal laws have recently lowered the level of alcohol that constitutes legal intoxication.[55] It is reasonable to ask whether it is unnecessarily harsh[56] for laws that treat all forms of felonious conduct, or all degrees of legal intoxication, as a total bar to compensation for injuries relating to another's tortious conduct.

2. Theories of Recovery Barred

One California statute establishing an unlawful conduct defense refers only to negligence claims arising from felonious conduct.[57] Quite logically, that provision has been interpreted as not precluding intentional tort actions.[58] However, another California law provides that in certain circumstances an owner

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[50] CAL. CIV. CODE § 3333.3 (West 2008) ("any felony").

[51] ALASKA STAT. § 09.65.210 (2008) (providing that an action for damages is barred by conviction of any felony or by clear and convincing evidence of a class A or class B felony of which the plaintiff was not convicted).

[52] ALASKA STAT. § 09.65.210 (2008). In Alaska, operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance is usually a class A misdemeanor. *See* ALASKA STAT. § 28.35.030 (b) & (n) (2008).

[53] *See* Stephen Allen, Note, *Mental Health Treatment and the Criminal Justice System*, 4 J. HEALTH & BIOMEDICAL L. 153, 176 (2008) (referring to "minor felonies"); Irina Kashcheyeva, Comment, *Reaching a Compromise: How to Save Michigan Ex-offenders from Unemployment and Michigan Employers from Negligent Hiring Liability*, 2007 MICH. ST. L. REV. 1051, 1087 n. 190 (2007) (discussing a statute that allows for the sealing of records relating to minor felonies).

[54] *Cf.* Rummel v. Estelle, 445 U.S. 263, 266 (1980) (discussing a felony conviction for obtaining $120.75 by false pretenses).

[55] *See* John Hoffman, Note, *Implied Consent With a Twist: Adding Blood to New Jersey's Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury*, 35 RUTGERS L.J. 345, 349-50 (2003) (reporting that most states have lowered their legal limit for intoxication to .08% blood alcohol content).

[56] *Cf. Rummel*, 445 U.S. at 288-89 (Powell, J., dissenting) (discussing history of the proportionality principle in Anglo-American criminal law and noting that "The Magna Carta of 1215 insured that '[a] free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity.'").

[57] *See supra* text accompanying note 40.

[58] *See* Jenkins v. County of Los Angeles, 88 Cal. Rptr. 2d 149, 153 (Cal. Ct. App. 1999) (involving injuries arising from shots fired by a police officer).

of real property shall not be liable for injuries that occur upon the property during or after the injured person's commission of any one of twenty-five specified felonies.[59] That statute has been held to bar not only suits for negligent conduct, but also claims for intentionally injurious acts that were justifiable under the circumstances.[60]

The Ohio statute quoted above in the text,[61] which broadly precludes "relief in a tort action,"[62] expressly states that it "does not apply to civil claims based upon alleged intentionally tortious conduct."[63] However, beyond that limitation, it is possible that the Ohio statute does not preclude a legal malpractice action at all. The Ohio law expressly provides that: "[a] 'tort action' means a civil action for damages for injury, death, or loss to person or property *other than a civil action for damages for a breach of contract or another agreement between persons*."[64]

A legal malpractice action, even if based on tort theories rather than contract principles, might be treated as a "civil action for damages for a breach of . . . [an] agreement" between the lawyer and client, and therefore not the type of "tort action" that is barred by the statute.[65] This question has not yet been decided by the Ohio courts, whose reported decisions seem to have seldom considered the state's statutory bar in any context. Interestingly, an action against a lawyer *by a nonclient*,[66] such as one for negligent misrepresentation[67] or aiding and abetting a breach of fiduciary duties,[68] might be treated differently than a claim by a client under the Ohio law. There is no "contract or another agreement" between a nonclient and lawyer, and therefore the nonclient's claim might qualify as a "tort action" that is barred by the plaintiff's felonious conduct. In that case, a question would arise as to why equally serious forms of unlawful conduct are sufficient to cut off a non-client's rights, but not the rights of a client. These issues, too, have not been resolved by the Ohio courts.

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[59] CAL. CIV. CODE § 847 (West 2008).

[60] *See* Calvillo-Silva v. Home Grocery, 968 P.2d 65, 69 (Cal. 1998) (interpreting CAL. CIV. CODE § 847).

[61] *See* OHIO REV. CODE ANN. § 2307.60 (B)(2) (West 2008).

[62] *Id.*

[63] *Id.* at (B)(3).

[64] *Id.* at (B)(1) (emphasis added).

[65] *Id.*

[66] *See generally* SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 134-36 (2008) (hereinafter LEGAL MALPRACTICE LAW) (discussing a dozen theories under which attorneys may be liable to third persons).

[67] *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977) (sets forth the classic formulation of the tort).

[68] *See generally* Katarina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 146 (2008); Douglas R. Richmond, *Lawyer Liability for Aiding and Abetting Clients' Misconduct Under State Law*, 75 DEF. COUNS. J. 130 (2008).

3. Types of Damages Precluded

Statutory unlawful conduct defenses sometimes specify what types of damages may not be recovered by a plaintiff, rather than what theories of liability (*e.g.*, negligence) are foreclosed.[69] For example, an Alaska law provides that if the person has engaged in certain forms of criminal conduct (such as "a felony . . . [of which] the person has been convicted"[70]), that person, or the person's personal representative, "may not recover damages for the [resulting] personal injury or death."[71] Legal malpractice by a lawyer is seldom alleged to have caused the death of a client—although cases have raised that argument.[72] The more relevant question, with respect to a provision such as the one found in the Alaska statute, is whether a claim for legal malpractice is an action seeking damages for "personal injury." That specific issue has not been addressed by Alaska courts. However, in other areas, the law sometimes treats legal malpractice as a "personal injury." That is why some courts hold that legal malpractice claims are not assignable[73] or that prejudgment interest is available to a successful plaintiff.[74] Yet, in other cases, the law has declined to characterize legal malpractice as a "claim for personal injury." Thus, some courts have held that a provision in a lawyer-client contract mandating arbitration of a legal

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[69] For example, one California statute addressing auto accidents bars recovery of damages to compensate for noneconomic losses such as pain and suffering or other nonpecuniary damages if the plaintiff was operating a vehicle under the influence of drugs or alcohol or owned or operated the vehicle without proper insurance or proof of financial responsibility. *See* CAL. CIV. CODE § 3333.4 (West 2008).

[70] ALASKA STAT. § 09.65.210(1) (2008).

[71] ALASKA STAT. § 09.65.210 (2008).

[72] *See, e.g.*, Cleveland v. Rotman, 297 F.3d 569, 574 (7th Cir. 2002) (rejecting a widow's claim that bad tax advice had caused her husband to commit suicide); McPeake v. William T. Cannon, Esq., P.C., 553 A.2d 439 (Pa. Super. Ct. 1989) (rejecting a claim arising from the death of a client who committed suicide after being found guilty); McLaughlin v. Sullivan, 461 A.2d 123, 127 (N.H. 1983) (holding that the connection between an attorney's alleged negligence and a client's suicide was too attenuated to impose legal liability on the attorney).

In *McPeake*, an attorney was allegedly negligent in representing a criminal defense client on charges of burglary, rape, indecent assault, and corrupting the morals of a minor. When a guilty verdict was returned at the trial, the client jumped from the fifth floor of the courthouse. The court refused to hold the attorney liable for the death for policy reasons, including the fact that imposing a risk of liability on these types of facts would discourage attorneys from representing "a sizeable number of depressed or unstable criminal defendants," and would therefore defeat the important goal of making legal counsel available to those who need it. 553 A.2d at 443. Presumably the same result could have been reached under a statutory or common law unlawful conduct defense because the client's proven felonious conduct was directly related to his death.

[73] *See* Kommavongsa v. Haskell, 67 P.3d 1068, 1078 (Wash. 2003) (en banc) (holding that a motorist's legal malpractice claim against a law firm that represented him in a personal injury action was not assignable).

[74] *See* Sample v. Freeman, 873 S.W.2d 470, 476 (Tex. App.1994) (holding that a legal malpractice action is a suit for personal injury and therefore prejudgment interest is available).

malpractice claim is not governed by provisions in the state arbitration act.[75] It is not possible to generalize about whether a legal malpractice action seeking damages is, or is not, a claim for personal injury for purposes of a statutory unlawful conduct defense. The answer inevitably depends on such matters as the relevant statutory language, legislative history, and case precedent. Nevertheless, it is important to recognize that the applicability of a statutory unlawful conduct defense to a legal malpractice action may turn upon the resolution of this type of question.

4. Nexus Between the Unlawful Conduct and Injuries

Statutes barring a plaintiff's action based on unlawful conduct do so only if that conduct is sufficiently linked to the damages the plaintiff seeks to recover. Yet, how strong that link must be varies with the language of the statute. Some statutes say that the plaintiff's injuries must have been "proximately cause[d]"[76] or "*in any way* proximately caused"[77] by the criminal conduct of the plaintiff. Other statutes use language which might be found to be less demanding, requiring simply that the plaintiff's conduct must have "substantially contributed" to the injuries for which recovery is sought.[78] As any law student knows, the principles of proximate causation cover broad territory.[79] However, a nexus requirement framed in terms of whether the plaintiff's conduct "substantially contributed" to the plaintiff's harm might deny judicial relief in an even wider range of cases.[80] To the extent that the unlawful conduct defense

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[75] *See, e.g.*, Taylor v. Wilson, 180 S.W.3d 627, 630-31 (Tex. App. 2005).

[76] OHIO REV. CODE ANN. § 2307.60(B)(2)(b) (West 2008).

[77] CAL. CIV. CODE § 3333.3 (West 2008) (emphasis added).

[78] ALASKA STAT. § 09.65.210(1) (2008).

[79] *See generally* LEGAL MALPRACTICE LAW, *supra* note 66, at 94-95. The text states:

> In the proximate-causation context, courts frame the issue in a variety of ways. Some courts say that it is unfair to hold the defendant responsible and find that there is no proximate causation if the harm was unforeseeable. Others ask whether the result was "within the risk" created by the defendant, that is, whether the harm that occurred was one of the dangers that made the defendant's conduct negligent. . . . If not, the defendant's conduct will not be found to be a proximate cause, and liability will not be assessed. Other courts ask whether the plaintiff's harm flowed from the defendant's negligence in a natural, continuous and unbroken sequence, . . . or whether the result was "normal" (not in the sense of being "usual," but in the sense of not being "bizarre"). If so, it may be fair to impose liability, and the defendant's conduct may be found to be a proximate cause of the plaintiff's injury. Many courts employ more than one of these modes of talking about proximate causation, selecting on a given occasion the language that seems most appropriate and useful.

Id. at 94-95. *See also* VINCENT R. JOHNSON, MASTERING TORTS: A STUDENTS GUIDE TO THE LAW OF TORTS 142-43 (3d ed. 2005) (discussing the loose requirements of proximate causation); JOSEPH A. PAGE, TORTS: PROXIMATE CAUSATION 19-27 (2003) (discussing competing approaches to the issue of proximate causation, including hindsight tests, risk-foreseeability tests, and the duty-risk test).

[80] *Cf.* Estate of Re v. Kornstein, Veisz & Wexler, 958 F. Supp. 907, 924-29 (S.D.N.Y. 1997) (holding that a breach of fiduciary duty claim that was subject to a "substantial factor" standard for

forecloses all civil redress, it is reasonable to ask whether "proximate causation" or "substantial contribution" are sufficiently demanding standards for ascertaining whether the plaintiff's unlawful conduct and injuries are so closely related that recovery should be denied.

Interestingly, court decisions embracing an unlawful conduct defense as a matter of common law[81] sometimes impose what seems to be a more demanding causation requirement than found in many statutes. According to the New York Court of Appeals, "a serious violation of the law" bars recovery only for those injuries which are "the *direct* result" of that violation.[82] Although what "direct"[83] means has not been definitively charted by New York courts, the language suggests a connection closer than mere proximate causation is required.[84]

5. Proof of the Plaintiff's Responsibility

Some statutes creating an unlawful conduct defense only bar a civil action for damages if the injured party was previously found guilty of a criminal offense.[85] This obviously poses difficulties to an assertion of the defense in a

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proving causation was more readily actionable against a law firm than a malpractice claim that was subject to the usual principles of proximate causation).

[81] *See generally infra* Part II.B.

[82] *See Barker*, 468 N.E.2d at 41 (emphasis added). Addressing this requirement, the court cited *Reno v. D'Javid*, 369 N.E.2d 766 (N.Y. 1977), and explained:

> In the *Reno* case a woman who submitted to an illegal abortion could not recover for alleged negligence on the part of the physician performing the operation. . . .
>
> [However, the] rule denying compensation to the serious offender would not apply in every instance where the plaintiff's injury occurs while he is engaged in illegal activity . . . . Thus if the plaintiff in the example cited above had been injured in an automobile accident as a result of another's negligence, she would not be denied access to the courts merely because she was on the way to have the illegal operation performed.

[83] The legendary Prosser hornbook talked about direct causation, as opposed to forseeability, as a test for proximate causation. *See* W. PAGE KEETON, DAN D. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 293-93 (5th ed. 1984). According to the hornbook, "'[d]irect' consequences are those which follow in sequence from the effect of the . . . [person's] act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which come into active operation later." *Id.* at 294. The hornbook notes that the distinction between "direct" and "indirect" causes is "obviously an arbitrary one." *Id.* Nevertheless, the direct causation view of proximate causation is today reflected in the law of many judicial decisions. *See, e.g.*, Cleveland v. Rotman, 297 F.3d 569, 573 (7th Cir. 2002) (stating that "[a] proximate cause is one that produces an injury through a natural and continuous sequence of events unbroken by any effective intervening cause").

[84] *See* Alami v. Volkswagen of America, Inc., 766 N.E.2d 574, 577 (N.Y. 2002) (holding that the New York common-law unlawful conduct defense does not extend "beyond claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act," and therefore a defective design claim against a car manufacturer was not barred by the intoxicated condition of the motorist who died in the crash of a vehicle).

[85] *See* CAL. CIV. CODE § 3333.3 (West 2008).

wrongful death or survival action arising from fatal injuries which caused death too soon for prosecution to be commenced and completed.[86]

Other statutes allow the injured person's criminal responsibility for a crime of which the person was not convicted to be established in the civil action itself.[87] To the extent that the standard of proof applicable in the civil suit is less demanding than the "beyond a reasonable doubt" standard applicable in a criminal prosecution, there is less certainty that the plaintiff in fact engaged in unlawful conduct inimical to the interests of society. Yet this has not troubled some legislatures. Alaska, for example, applies a "clear and convincing evidence" standard.[88] Nor has certainty "beyond a reasonable doubt" been a serious concern to certain courts that have recognized the unlawful conduct defense as a matter of common law.[89] In one New York case, where a child sought recovery for personal injuries arising from the construction of a pipe bomb, the court held that the action was barred by the unlawful conduct defense notwithstanding the fact that the child had not been convicted of the crime and, indeed, because of his age, could "not be held criminally responsible for his conduct."[90] The court took what some would regard as a pragmatic view. Finding that the child, fifteen years of age, had "never claimed that he was ignorant of the fact that his conduct was wrongful,"[91] the court concluded that "the fact remains that constructing a bomb is prohibited by law."[92]

6. Application to Malpractice Actions

A search of reported cases indicates that statutes barring actions for damages based on criminal conduct have seldom been invoked in legal malpractice cases.[93] Yet, the text of some laws is broad enough to permit the argument that a legal malpractice action may not be maintained by a plaintiff who engaged in serious criminal conduct. In a legal malpractice action against a public defender, the California Supreme Court held that the client had to prove innocence of the charge on which he was convicted.[94] The court supported its

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[86] *See* Horwich v. Super. Court, 980 P.2d 927, 938 (Cal. 1999) (noting that conviction of the decedent is "an unlikely event if the felon or drunk driver dies in the incident").

[87] *See* ALASKA STAT. § 09.65.210(2), (3), & (5) (2008).

[88] *See id.*

[89] *See infra* Part II.B.

[90] *Barker*, 468 N.E.2d at 42.

[91] *Id.* at 43.

[92] *Id.* at 42.

[93] A number of the cases holding that a claim was barred by a statutory unlawful conduct defense have involved the use of force by police officers. *See* Sun v. State, 830 P.2d 772, 777-78 (Alaska 1992) (holding that an excessive force claim was barred because the plaintiff's criminal conduct "substantially contributed to his injuries"); Allensworth v. City of Los Angeles, 2002 WL 321887, *6 (Cal. Ct. App. 2002.) (holding that defendant's claims were precluded by defendant's criminal conviction); Maxie v. Preijers, 201 F.3d 444 (9th Cir. 1999) (affirming dismissal of a negligence claim).

[94] *See generally infra* Part III.A.

opinion with a "cf." citation to California Civil Code § 3333.3, quoted above in the text,[95] which holds that a negligence action may not be maintained for injuries caused by a felony of which the plaintiff was convicted.[96] The suggestion implicit in the citation is that such laws are not irrelevant to issues of attorney liability.

At least one California case has considered whether felonious conduct bars an action for *medical* malpractice.[97] In that suit, the plaintiff, Nakauchi, who was convicted of assault and false imprisonment, sued his psychiatrist alleging that improper medication had caused him to commit the crimes which led to his liability for a civil judgment to his victim, Quan, and to his own damages in the form of lost earnings and diminished earning capacity as a result of his incarceration.[98] The intermediate court concluded that a "[l]iteral application of the broad language" of California Civil Code § 3333.3 "would appear to preclude" the plaintiff's tort action against the psychiatrist "since the injury for which he now seeks damages . . . (the Quan civil judgment and Nakauchi's own loss of earnings and earning capacity) was substantially caused by Nakauchi's commission of his felony assault on Quan."[99] However, the court concluded that:

> [T]he ballot materials circulated with Proposition 213 make it clear section 3333.3 is limited to circumstances in which a convicted felon accidentally suffers a personal injury while actually committing a crime or fleeing from the crime scene (for example, a burglar slips and falls on a slippery floor while robbing a convenience store).[100]

Other courts might reach a different conclusion in deciding whether statements in ballot materials trump the express language of a ballot initiative.[101] Moreover, some statutory unlawful conduct defenses may arise from contexts that support a broad application of the rule as precluding a legal malpractice suit for damages.

B. Common Law Defenses

1. Generally

Even in the absence of a statute specifying that serious criminal conduct forecloses a civil action for damages, courts have denied redress as a matter of

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[95] *See supra* text accompanying note 40.

[96] *See* Wiley v. County of San Diego, 966 P.2d 983, 987-88 (Cal. 1998).

[97] *See* Nakauchi v. Vollero, 2005 WL 3360902 (Cal. Ct. App. 2005).

[98] *See id.* at *7.

[99] *Id.* at *7 n.13.

[100] *Id.* at *7 n. 13.

[101] *See generally* Hondo Co. v. Superior Court, 78 Cal. Rptr. 2d 855, 857-61 (Cal. Ct. App. 1998), *review granted and opinion superseded by* Hondo Co. v. Super. Court, 970 P.2d 408 (Cal. 1999) (discussing in detail the proper interpretation of Cal. Civ. Code §§ 3333.3 and 3333.4).

common law to persons whose claims were based on their own illegal acts.[102] According to one court:

> This rule promotes the desirable public policy objective of preventing those who knowingly and intentionally engage in an illegal or immoral act involving moral turpitude from imposing liability on others for the consequences of their own behavior. Even so, such a rule derives principally not from consideration for the defendant, "but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government."[103]

As explained by another court, if a common law unlawful conduct defense were not recognized by the judiciary, several unacceptable consequences would result:

> First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct . . . . Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, . . . the public would view the legal system as a mockery of justice. Fourth, . . . wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties.[104]

An unlawful conduct defense has been applied as a matter of common law in a wide range of cases.[105] Decisions have held, for example, that a suspect shot during a robbery could not sue the police for failing to arrest him prior to the robbery;[106] that the owner and manufacturer of a vending machine were not liable

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[102] *See* Fuentes v. Alecio, 2006 WL 3813780, *3 (S.D. Tex. 2006) (holding that a wrongful death claim relating to a person who perished while trying to enter the United States illegally was barred). *See also* Chapman v. Super. Court, 29 Cal. Rptr. 3d 852, 862-63 (Cal. Ct. App. 2005) (holding that public policy barred a former public official, who pleaded guilty to willful commission of a crime, from maintaining a legal malpractice action against an attorney based on the attorney's alleged misinterpretation of a statute); Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 467 (Tex. App. 1994) (holding that public policy precluded judicial consideration of a legal malpractice suit for damages by clients who were convicted of knowingly committing bank fraud after they had allegedly received negligent advice relating to a bank loan transaction).

[103] Oden v. Pepsi Cola Bottling Co. of Decatur, Inc., 621 So. 2d 953, 954-55 (Ala. 1993) (quoting Bonnier v. Chicago, B. & Q. R.R., 113 N.E.2d 615, 622 (1953), *rev'd on other grounds*, 119 N.E.2d 254 (1954), which held that a blacksmith's unlawful act of going onto a gondola car and taking therefrom a piece of scrap metal belonging to a third person was sufficient to defeat his action for injuries sustained when he was thrown from the top of the gondola car).

[104] Orzel by Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 (Mich. 1995).

[105] *See generally* Laura Hunter Dietz, *Actions Based upon Plaintiff's Wrongful, Illegal, or Immoral Acts or Conduct*, AM. JUR. 2D ACTIONS § 39 (2008).

[106] *See* Amato v. United States, 549 F. Supp. 863, 867 (D.N.J. 1982) (opining that "[p]laintiff, in effect, states to the FBI that you should have stopped me, and because you did not, I was injured and you are responsible. If the contention were carried to its logical extreme, the government would be liable to a burglar who fell off a ladder during the course of a burglary, if the police had the basis to arrest him earlier and did not."), *aff'd without opinion*, 729 F.2d 1445 (3d Cir. 1984).

to the estate of a minor who was killed when the machine fell on him during his attempt to steal drinks;[107] and that a guide who was convicted of transporting hunters without a license could not sue the state for damages in the form of lost business that were allegedly attributable to the state's negligence in responding to the guide's request for a license.[108] Likewise, courts have held that the perpetrator of manslaughter had no claim against the manufacturer and seller of the shotgun for direct personal losses alleged to have resulted from the shooting,[109] nor a customer against a bar that had served him liquor in violation of a dram shop law,[110] nor a passenger against a driver for injuries resulting from the operation of a stolen vehicle.[111]

Like statutory versions of the unlawful conduct outlaw doctrine, which often require proof of a felony, some common law versions of the defense also require clear proof of criminal conduct.[112] However, other common law formulations of the defense are broadly worded[113] and may encompass conduct that does not amount to a felony or even a serious misdemeanor. For example, as stated by the Supreme Court of Iowa, the general rule is that:

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[107] *See* Oden v. Pepsi Cola Bottling Co. of Decatur, Inc., 621 So.2d 953, 954-55 (Ala. 1993) (interpreting Hinkle v. Railway Express Agency, 6 So. 2d 417 (1942), which stated that "[a] person cannot maintain a cause of action if, in order to establish it, he must rely in whole or part on an illegal or immoral act or transaction to which he is a party," as barring "any action seeking damages based on injuries that were a direct result of the injured party's knowing and intentional participation in a crime involving moral turpitude.").

[108] *See* Beilgard v. State, 896 P.2d 230, 233-34 n.6 (Alaska 1995) (finding that while a statutory unlawful conduct defense did not apply to the plaintiff because he was not convicted of a felony, public policy considerations precluded his claim for relief).

[109] *See* Adkinson v. Rossi Arms Co., 659 P.2d 1236 (Alaska 1983).

[110] *See* Lord v. Fogcutter Bar, 813 P.2d 660 (Alaska 1991); *see also* Vandenburg v. Brosnan, 514 N.Y.S.2d 784 (App. Div. 1987), *aff'd*, 524 N.Y.S.2d 672 (N.Y. 1988) (holding that a passenger who procured beer for a minor driver had no cause of action against the seller).

[111] *See* Lee v. Nationwide Mut. Ins. Co., 497 S.E.2d 328 (Va. 1998) (finding that a minor who was injured in an accident involving a stolen vehicle was barred from recovery against the driver).

[112] *See* Rimert v. Mortell, 680 N.E.2d 867, 872 (Ind. Ct. App. 1997) (stating that many jurisdictions have barred "actions seeking damages which were a direct result of the injured party's knowing and intentional participation in a criminal act"); *Barker*, 468 N.E.2d at 41 (stating that "when the plaintiff's injury is a direct result of his knowing and intentional participation in a criminal act he cannot seek compensation for the loss, if the criminal act is judged to be so serious an offense as to warrant denial of recovery"). *See also* Craft v. Mid Island Dep't. Stores Inc., 492 N.Y.S.2d 780, 782 (N.Y. App. Div. 1985) (holding that the conduct of a minor in pouring pools of gasoline and lighting them with matches not such a serious violation of the law, or so criminal in nature, as to preclude recovery from the marketers of an allegedly flammable sweatshirt; "none of the defendants point to any penal statute applicable to the use of gasoline.").

[113] *See, e.g.*, Saks v. Sawtelle, Goode, Davidson & Troilo, 880 S.W.2d 466, 469 (Tex. App. 1994) (stating that "no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party.") (quoting Gulf v. Johnson, 9 S.W. 602, 603 (Tex. 1888)).

> a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect, . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws . . . .[114]

Moreover, while many statutes bar a civil action for damages only where the defendant has been previously convicted of a specified criminal offense, cases have held that a common law defense predicated on unlawful conduct bars tort claims even in the absence of prior prosecution and conviction. Thus, the rule has been found applicable where unlawful conduct resulted in the death of the lawbreaker.[115] Broad application of the common law defense based on unlawful conduct has even been held to bar claims by persons who did not engage in unlawful conduct, such as a surviving spouse's claim for loss of consortium.[116]

A Michigan court endeavored to offer a detailed outline for the common law defense:

> [W]hen a plaintiff's action is based on his own illegal conduct, the claim is generally barred . . . . This maxim, known as the wrongful-conduct rule, has its exceptions. The mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred . . . . To fall under the bar of the rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute . . . . There must also be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages . . . . Another possible exception to the wrongful conduct rule is where both the plaintiff and the defendant have engaged in illegal conduct, but the defendant's culpability for the damages is greater than the plaintiff's culpability . . . . This may occur, for example, where the plaintiff has acted "under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age." . . . Finally, a plaintiff's claim is not barred by his wrongful conduct if a statute violated by the defendant explicitly authorizes recovery by a person similarly situated as the plaintiff . . . .[117]

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[114] Cole v. Taylor, 301 N.W.2d 766, 768 (Iowa 1981) (quoting 1 C.J.S. *Actions* § 13 pp. 996-97).

[115] *See* Oden v. Pepsi Cola Bottling Co. of Decatur, Inc., 621 So. 2d 953, 954 (Ala. 1993) (finding that because the parties did not dispute the fact that the decedent was stealing drinks from the vending machine when it fell on him, judgment for the defendants was proper); La Page v. Smith, 563 N.Y.S.2d 174 (N.Y. App. Div. 1990) (holding that an estate was barred from recovery for the death of an intoxicated driver during a high-speed race).

[116] *See Cole*, 301 N.W.2d at 768 (holding that a husband's loss of consortium claim should "be barred on the same public policy grounds" because such a claim "would also arise from a criminal act" and "the policies should not allow indirectly for the husband what they disallowed directly for the wife").

[117] Poch v. Anderson, 580 N.W.2d 456, 458 (Mich. Ct. App. 1998).

As the quotation suggests, common law versions of an unlawful conduct defense are not necessarily simple. In one recent case, the Fifth Circuit reversed a judgment for the defendants, finding that, under Texas law, "there are multiple versions of the unlawful acts rule; versions which emphasize different links between a plaintiff's illegal acts and injuries suffered . . . [and that] the contours of the unlawful acts rule are simply too unclear to say that because of this rule, Plaintiffs have no possibility of recovery. . . ."[118]

As with statutory unlawful conduct defenses, the plaintiff's bad conduct must be sufficiently closely linked to the damages for which recovery is sought to make it fair to bar recovery. Where that nexus is lacking, the defense will be rejected by the court.[119]

2. Application to Malpractice Actions

A number of decisions in the *medical* malpractice field have applied a common law unlawful conduct defense to bar civil actions for damages. Thus, courts have held that allegedly negligent psychologists,[120] psychiatrists,[121] pharmacists,[122] physicians,[123] and other mental health care professionals[124] or

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[118] Rico v. Flores, 481 F.3d 234, 243-44 (5th Cir. 2007) (involving claims related to the deaths of ten illegal aliens who stowed away in a grain hopper railroad car in an attempt to pass undetected through the Border Patrol checkpoint).

[119] *See, e.g.*, Lindley v. Hackard & Holt, No. 3:05-CV-1476-L, 2007 WL 1119287, *7 (N.D. Tex. April 13, 2007) (finding the defense inapplicable because the defendant failed to show that the illegal acts caused or contributed to damages relating to fees owed under an unrelated, legitimate contract for legal referrals).

[120] Glazier v. Lee, 429 N.W.2d 857, 858-60 (Mich. Ct. App. 1988) (in holding that a psychologist should not be liable for the emotional and psychological injuries resulting to a patient who killed his girlfriend, the court recognized the "legal principle that a court will not aid one who founds his cause of action upon an immoral or illegal act" and opined that "[t]o allow plaintiff to proceed in the present civil action would allow plaintiff to shift the responsibility for his crime from himself to defendant").

[121] *See* Burcina v. City of Ketchikan, 902 P.2d 817 (Alaska 1995) (holding that, as a matter of public policy, a patient who set fire to a mental health center and was convicted of arson could not assert a cause of action against his psychiatrist or the facility at which he received treatment); *Cole*, 301 N.W.2d at 768 (barring the plaintiff from suing her psychiatrist for negligently failing to prevent her from committing a murder).

[122] Orzel by Orzel v. Scott Drug Co., 537 N.W.2d 208, 210 (Mich. 1995) (holding that an action by a drug user and his relatives against a pharmacy for negligently and illegally filling purportedly valid prescriptions was barred by the drug user's own illegal conduct).

[123] Ward v. Emmett, 37 S.W.3d 500, 503 (Tex. App. 2001) (holding that negligence and other claims against a therapist and physician were barred by the unlawful act rule because the claims were for damages that arose from the murder she committed; the plaintiff's illegal conduct was "not merely incidental to her claims," but "inextricably intertwined with those claims"). *But see* Boruschewitz v. Kirts, 554 N.E.2d 1112 (Ill. App. Ct. 1990) (holding that where an outpatient, who shot and killed two persons, was found guilty but mentally ill, an action against a physician and mental health center was not necessarily barred by the outpatient's violation of criminal laws or immoral acts, and remanding the case for further proceedings).

their employers[125] were not liable for damages suffered by patients as a result of crimes committed by those patients.[126] Notably, several of these cases have expressly rejected arguments that a defendant should not be permitted to assert the unlawful conduct defense if the defendant took charge of the plaintiff with knowledge of the plaintiff's dangerous tendencies.[127]

Actions for medical malpractice and legal malpractice are in many respects governed by similar principles.[128] Thus, it is reasonable to suggest that the common law unlawful conduct defense that has been applied to bar medical malpractice claims might also, on appropriate facts, preclude an award of relief to a legal malpractice plaintiff.[129]

Some cases have held that a common law unlawful conduct defense will defeat a claim against an attorney. In one recent suit, the court ruled that an individual had no legal right to remove documents that employees of third parties had placed in a trash dumpster on private property. Therefore, the unlawful acts rule precluded the individual from bringing an action for fraud against the third parties' attorney, based on allegations that the attorney had defrauded the individual into turning the documents over to the attorney.[130]

III. DEFENSES TO LEGAL MALPRACTICE BASED ON UNLAWFUL CONDUCT

A. The Exoneration/Innocence Requirement

In the legal malpractice field, the unlawful conduct defense finds its clearest endorsement in the decisions that have required persons alleging defective

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[124] *But see* Gragg v. Auburn Counseling Assocs., Inc., 2002 WL 1375746, at *2 (Mich. Ct. App. 2002) (finding that the "wrongful conduct rule" did not bar the plaintiff's medical malpractice claim because "he would not have to prove that . . . [the plaintiff's decedent] was driving on a suspended license at the time of the car accident or that she was charged with negligent homicide to prevail on his claim").

[125] *See* Preston v. State, 543 N.Y.S.2d 823, 824 (N.Y. App. Div. 1989) (a claimant convicted of assault was barred from suing the State for alleged medical malpractice resulting from not confining him prior to the incident).

[126] *See also* Rimert v. Mortell, 680 N.E.2d 867, 876 (Ind. Ct. App. 1997) (holding that the unlawful conduct defense barred a claim for payment from a Patient's Compensation Fund).

[127] *See, e.g., Cole*, 301 N.W.2d at 767 (noting that the plaintiff had (unsuccessfully) cited Prosser's *Handbook on the Law of Torts* on the subject of the duty to control others).

[128] For example, the informed consent principle that is well established in medical malpractice law also finds application in legal malpractice cases. *See* Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 568-76 (2004) (discussing informed consent in law and medicine); Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 749-50 (2003) [hereinafter "*Absolute and Perfect' Candor*"] (similar).

[129] *Cf.* Tracy Bateman Farrell and Elizabeth Williams, *Effect of Client's Illegal Acts*, 7 TEX. JUR. 3D ATTORNEYS AT LAW § 325 (2008) (stating that "[a] plaintiff's illegal acts committed knowingly and willfully cannot be a basis for recovery of damages in a legal malpractice action").

[130] Sharpe v. Turley, 191 S.W.3d 362, 369 (Tex. App. 2006).

criminal representation to first overturn their convictions[131] and, in some states, prove their innocence of the crimes for which they were prosecuted.[132] Although these cases do not use the term "unlawful conduct defense," they clearly seize upon the defendant's unlawful conduct to insulate attorneys from liability.

What is most striking about state exoneration or innocence requirements is how broadly they sweep. Any kind of criminal conduct (misdemeanors as well as felonies), however established (whether by plea or conviction), wholly bars an action for professional negligence (regardless of the gravity of the attorney's misconduct).[133] This is a broad formulation of what, for legal malpractice purposes, amounts to an "outlaw" doctrine.[134] It is easy to doubt the wisdom of these formidable obstacles to recovery for attorney wrongdoing. Not surprisingly, exoneration or innocence requirements have been widely criticized[135] and their supposed rationales have sometimes been shown as wanting.[136]

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[131] *See generally* Canaan v. Bartee, 72 P.3d 911, 913 (Kan. 2003) (joining the "large majority of courts" that hold that "a person convicted in a criminal action must obtain postconviction relief before maintaining an action alleging malpractice against his former criminal defense attorneys," evaluating the policy justifications for the rule, and citing authorities); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. d (2000) (rejecting an innocence requirement, but stating that "a convicted defendant seeking damages for malpractice causing a conviction must have had that conviction set aside when process for that relief . . . is available.").

[132] *See, e.g.*, Coscia v. McKenna & Cuneo, 25 P.3d 670, 672 (Cal. 2001) (stating that "[i]n a legal malpractice case arising out of a criminal proceeding," California, like most jurisdictions, also requires proof of actual innocence).

[133] *Cf.* Amy L. Leisinger, Comment, *A Criminal Defendant's Inability to Sue His Lawyer for Malpractice: The Other Side of the Exoneration Rule [Canaan v. Bartee, 72 P.3d 911 (Kan. 2003)]*, 44 WASHBURN L.J. 693, 727 (2005) (stating that "criminal defendants are left without redress for even the most egregious legal malpractice, while the rule insulates defense attorneys from full accountability for their negligent representation.").

[134] *See supra* Part I.

[135] *See* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 46-47 (2002) (opining that "[t]he actual innocence rule makes the tort system available only to the innocent. However, both the innocent and the guilty accused of a criminal offense are entitled to non-negligent legal representation . . . . Permitting only actually innocent criminal defendants to avail themselves of the tort system exposes all criminal defendants–whether innocent or not–to representation by lawyers who have the dangerous freedom of practicing law without accountability"); Amy L. Leisinger, Comment, *A Criminal Defendant's Inability to Sue His Lawyer for Malpractice: The Other Side of the Exoneration Rule [*Canaan v. Bartee, *72 P.3d 911 (Kan. 2003)]*, 44 WASHBURN L.J. 693, 694 (2005) (arguing that the "exoneration rule protects undeserving defense attorneys and unduly burdens criminal defendants who deserve competent and careful legal counsel"); Roy Ryden Anderson, *Hey Walter: Do Criminal Defense Lawyers Not Owe Fiduciary Duties to Guilty Clients? An Open Letter to Retired Professor Walter W. Steele, Jr.*, 52 SMU L. REV. 661, 674 (1999) (suggesting that an exoneration requirement gives "attorneys who have sold their clients down the river one heck of an incentive to go ahead and sink the boat they put their clients on"); Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 341 (2007) (arguing that the "reasoning behind such requirements is faulty"); AMERICAN LAW INSTITUTE, 1998 PROCEEDINGS 133 (1999) (quoting Professor Roger C. Cramton of New York as

To begin with, these obstacles to recovery – which are not affirmative defenses, but additional requirements in the plaintiff's *prima facie* case[137]–are simply doctrinal overkill.[138] If the concern is that an undeserving claim will succeed, there is little cause for worry. It is difficult for even appealing and sympathetic plaintiffs with good facts to prevail on malpractice claims.[139] Presumably, it is all the more challenging for one carrying the stigma of actual or apparent criminality to do so.[140] The difficulty of finding an attorney to initiate a malpractice action,[141] the nature of the jury system,[142] the demanding

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stating that the "major argument" against an exoneration requirement is that "essentially this puts a convicted person, unlike a civil litigant, unlike a client generally, in a situation of proving constitutional rights have been violated in order to get an effective relief against inadequate lawyering").

[136] *See* King, *supra* note 30, at 1057-61 (refuting in detail the proffered justifications for exoneration or innocence requirements in criminal malpractice litigation).

[137] *See* Christopher Scott Maravilla, *Monday Morning Lawyering: Proximate Cause and the Requirement of Actual Innocence in a Criminal Defense Malpractice Action*, 16 WIDENER L.J. 131, 133 (2006) (explaining that "in order for the former attorney's negligence to have proximately caused the plaintiff's harm, the former criminal defendant must establish that it was the attorney's negligent representation, not the plaintiff's own criminal behavior, that led to the harm suffered. The courts' reason is that the former criminal defendant's own actions, not the alleged negligence of defense counsel, are the cause in fact of his or her conviction.").

[138] The overkill is all the greater in states that follow a "two-track approach" in calculating the running of the statute of limitations on a legal malpractice claim. In these states, the running of the statute is not suspended while the criminal defendant pursues post-conviction relief. Rather, the convicted (and presumably incarcerated) defendant must simultaneously pursue a claim for post-conviction relief in criminal proceedings and a legal malpractice claim in civil proceedings. *See* Ereth v. Cascade County, 81 P.3d 463, 469 (Mont. 2003) (endorsing a two-track approach, but noting that a trial court handling the civil suit would have discretion to grant a stay "keeping in mind the nature of the claim asserted for postconviction relief"); McKnight v. Office of Public Defender, 936 A.2d 1036, 1043 (N.J. Super. Ct. App. Div. 2007) (similar).

[139] *See, e.g.*, Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 118 (Tex. 2004) (holding that a malpractice claim, based on a firm's substitution of an inexperienced, unprepared associate as trial counsel, was not actionable because of the demanding standards that govern proof of causation). *See also* Kelli M. Hinson and Elizabeth A. Synder, *Recent Developments in Texas Legal Malpractice Law*, 38 ST. MARY'S L.J. 1003, 1021-24 (2007) (discussing causation and other obstacles to recovery).

[140] *See* AMERICAN LAW INSTITUTE, 1997 PROCEEDINGS 352 (1998) (quoting Professor Roger C. Cramton of New York as arguing against an exoneration or innocence requirement because in a malpractice action under ordinary causation rules, "proof of the guilt of the defendant will be taken into account by the judge and jury").

[141] It is not as hard as it once was to find an attorney willing to sue another attorney. However, lawyers who work on a contingent fee basis, as many malpractice plaintiff's lawyers do, carefully screen their cases, because if the claim cannot be sold to the jury, the lawyer will not get paid. *See Tort Law in America*, *supra* note 16, at 244. Lawyers know that a person accused or convicted of crime may well be viewed with disdain by members of the jury. It seems likely that a plaintiff's attorney working on a contingent fee will be reluctant to champion the cause of a person alleging defective criminal representation, except in the strongest of cases.

requirements of the "trial within a trial" causation analysis,[143] and the rules that protect a lawyer's exercise of discretion[144] all conspire to defeat a malpractice claim raised by one charged with or convicted of a crime.[145] Is it really necessary or appropriate to erect additional barriers to liability in the form of exoneration or innocence requirements? Probably not.[146] Indeed, in some cases it is simply impossible for a convicted criminal to obtain post-conviction relief for procedural reasons. During the American Law Institute's debate over whether the *Restatement (Third) of the Law Governing Lawyers* should endorse an exoneration requirement, one member told the assembled judges, lawyers, and law professors:

> I have seen . . . an actual case, where you have a clear *Miranda* violation, where the defense lawyer, for whatever reason, does not raise it. To me that is clearly malpractice, yet, in a post-conviction proceeding, because the point was not raised [at trial], it would almost certainly be held procedurally barred. . . . [R]equiring that the conviction be set aside, in a post-conviction proceeding, is a very unrealistic and unworkable idea.[147]

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[142] *See* Nancy S. Marder, *Justice Stevens, the Peremptory Challenge, and the Jury*, 74 FORDHAM L. REV. 1683, 1704 (2006) (raising doubts as to whether lawyers are adept at removing unsympathetic or hostile persons from the jury pool); *but see* Jennifer Knauth, *Legal Malpractice: When the Legal System Turns on the Lawyer*, 35 ST. MARY'S L.J. 963, 969 (2004) (opining that "if the jury is asked to choose between identifying with the client in a legal malpractice case or identifying with the lawyer, the client is at a distinct advantage and the lawyer a significant disadvantage").

[143] *See, e.g.*, Anheluk v. Ohlsen, 390 F. Supp. 2d 865, 869-70 (D.N.D. 2005) (stating that "[t]he 'case within a case' doctrine requires the client to prove that, but for the attorney's alleged negligence, the litigation would have been concluded in a manner more favorable to the client"); *cf.* Holley v. Massie, 654 N.E.2d 1293, 1297 (Ohio Ct. App. 1995) (finding in a malpractice action that, even if a client's attorney "fell asleep twice at trial," there was no evidence that the attorney's conduct caused damage because "[w]e must assume that jurors take conscientiously their responsibility to decide the outcome of the trial in accord with . . . the evidence presented to them" and "[c]ounsel's sleeping during trial is not evidence").

[144] *See* Steven Wisotsky, *Appellate Malpractice*, 4 J. APP. PRAC. & PROCESS 577, 590-93 (2002) (discussing the "honest exercise of professional judgment" defense).

[145] *See also* Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251, 1256 (2003) (stating that "common impediments" to a criminal defendant's legal malpractice action may also include an "inability to evade the collateral estoppel bar, failure to circumvent the expiration of the statute of limitations, . . . [and] failure to prove a legally cognizable harm").

[146] *But see* Nick Hedding, *Notes and Comments: The Fine Line Between Strategic Miscalculation and Harmful Error: Consequences and Repercussions of Legal Malpractice to the Criminal Defense Attorney*, 4 J. LEGAL ADVOC. & PRAC. 222 (2002) (arguing that even an actual innocence requirement is insufficiently protective of the interests of criminal defense attorneys and legislation should be enacted to "require that before the malpractice claim may be filed it must contain direct evidence that the defense counsel in a criminal case had the ability, based on the evidence available at the time of disposition or trial, to demonstrate the reasonable doubt necessary to dissuade a possible finding of guilt").

[147] *See* AMERICAN LAW INSTITUTE, 1997 PROCEEDINGS 353 (1998) (quoting James L. Robertson of Mississippi).

In addition, exoneration or innocence requirements are of dubious value from the standpoint of legal deterrence. In the sphere of criminal defense work, there are virtually no legal mechanisms for enforcing the standards of conduct that should be observed by attorneys.[148] Requests for post-conviction relief based on ineffective assistance of counsel seldom succeed.[149] Disciplinary sanctions against errant criminal defense lawyers are a rarity.[150] And motions for disqualification[151] or disgorgement of fees[152] are essentially unheard of in the world of criminal representation. The threat of malpractice liability — however difficult it may be for a claim to succeed — can serve a salutary purpose. That risk tends to ensure some form of lawyer accountability to the professional obligations — including the duties of diligence,[153] competence,[154] and

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[148] *See* Johanna M. Hickman, *Current Developments 2004-2005: Recent Developments in the Area of Criminal Malpractice*, 18 GEO. J. LEGAL ETHICS 797, 797 (2005) (concluding that "[c]riminal defendants . . . have few options available to rectify the harm caused by lawyers who fail to live up to the standards of their profession"). One non-legal enforcement mechanism that does have the potential to deter improper attorney conduct is bad publicity. Stories in the media can focus attention on alleged attorney misdeeds. *See, e.g.*, Karisa King, *Dual Legal Role Debated*, SAN ANTONIO EXPRESS-NEWS, Feb. 10, 2008, at A1 (presenting an extensive front-page inquiry into whether criminal defense attorneys who also serve as bail bondsmen for their clients have conflicts of interest). The problem is the attention of the press to ethics issues is haphazard. *Cf.* Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J. L. & PUB. POL'Y 1, 54 (2006) (noting that media scrutiny of ethics problems is hampered by "the limited resources of many newspapers and broadcasters, as well as the distraction of other public events that command reporters' attention").

[149] *See* Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 (1999) (reporting that "[c]hallenges based on ineffective assistance of counsel are the most frequently filed claims in both federal and state post-conviction relief proceedings" but "are often unsuccessful because of the rigid test that determines whether ineffectiveness rises to a constitutionally significant level").

[150] *See* Duncan, *supra* note 135, at 43 (stating that "not one jurisdiction seems actively to use the disciplinary process to protect criminal defendants from incompetent criminal defense representation, even though doing so could help to compensate for the shortcomings of the constitutional and civil safeguards").

[151] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 (2000) (discussing remedies for lawyer wrongs, including disqualification).

[152] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (discussing forfeiture of fees based on "clear and serious violation of duty" to a client).

[153] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2007) (discussing the duties of diligence and promptness).

[154] *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. 1-6 (2007) (discussing the duty of competence, including obligations pertaining to knowledge, skill, thoroughness, and preparation).

communication[155] — that should animate the zealous and faithful representation of all clients,[156] including criminal defendants who are guilty.

The cynical explanation for the rush by states to adopt exoneration and innocence requirements that bar malpractice actions is that this is just another effort to limit the rights of criminals and those suspected of crimes.[157] In other words, one might argue, these requirements are just another part of the ongoing "war on crime."[158]

However, a more convincing explanation is that proponents of these rules were concerned about the risk of poorly-compensated criminal defense attorneys, often appointed by courts, being deluged with malpractice claims filed by prisoners. When the American Law Institute adopted its variation of the exoneration requirement,[159] one member argued, in terms that others have voiced:[160] "Most of the litigants will be prisoners, and . . . litigation can be at least a form of therapy, if not recreation. This will result in . . . suits against lawyers, and it will result in congestion of the courts in terms of a huge host of frivolous litigation . . . ."[161] Another member echoed the same theme, urging that:

> The social consequence of enabling . . . [a flood of litigation] from the prisoner libraries to go against the handful of lawyers who get into this area [of criminal representation] and defend these people, at great value to the community, is to deter lawyers from getting into this area. It is bad public policy.[162]

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[155] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2007) (discussing the duty of communication); *"Absolute and Perfect" Candor*, *supra* note 128, at 742-51 (discussing competing formulations of principles governing disclosure obligations).

[156] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2007) (stating that a "lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

[157] *Cf.* Bennardo, *supra* note 135, at 361 (opining that "some justifications proffered for the proof-of-actual-innocence requirement smack of little more than hostility towards convicts bringing criminal malpractice lawsuits").

[158] *Cf.* V. F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 928-29 (2004) (asserting that "[a]lmost every president since [Franklin Roosevelt] has waged war on crime, whether a small one (as Eisenhower's battle against juvenile delinquency) or a fierce one (like Kennedy's battle against organized crime), one primarily focused on predators (as Reagan's), or one disastrously focused on political enemies (as Nixon's)").

[159] *See* RESTATEMENT (THIRD) OF TORTS § 53 cmt. d (2000) (requiring the conviction to be set aside, but not requiring proof of innocence).

[160] *See* Bennardo, *supra* note 135, at 348 (asserting that "[n]umerous jurisdictions state that requiring proof of post-conviction relief will prevent frivolous malpractice lawsuits").

[161] AMERICAN LAW INSTITUTE, 1998 PROCEEDINGS 132 (1999) (comments of Chief Judge D. Brock Hornby of Maine).

[162] AMERICAN LAW INSTITUTE, 1998 PROCEEDINGS 134 (1999) (comments of Sheldon H. Elsen of New York).

These are legitimate concerns.[163] Yet, whether they are strong enough to always trump society's interest in affording a damages remedy to persons harmed by negligent criminal representation is far from clear. Other alternatives are available. Appointed lawyers could be protected by some variety of immunity.[164] Criminal defense lawyers who charge a full fee could be expected to protect themselves from the costs of claims the way other lawyers do: by practicing preventive lawyering and purchasing malpractice insurance.

A plaintiff's unlawful conduct should bar recovery in a tort action only in cases where the plaintiff's default is great and only if that misdeed is related to the attorney's negligence in such a way that it is fair to totally foreclose recovery. The cases imposing an exoneration or innocence requirement on plaintiffs suing for malpractice arising from criminal defense work sweep much too broadly to honor these important factors.

B. In Pari Delicto

Another indication that legal malpractice law already endorses an unlawful conduct obstacle to recovery is that cases hold that an action for damages is barred by the affirmative defense of *in pari delicto*.[165] Parties stand "*in pari delicto*" when they are equally at fault.[166] According to the Latin maxim *in pari delicto potior est conditio defendentis*, "in a case of equal or mutual fault . . . the

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[163] *Cf.* Pamela A. MacLean, *Inmate Petitions Swamp Judges*, NAT'L L.J., Aug. 4, 2008 at 4 (discussing how thousands of state prisoner petitions swamped certain California courts, prompting a call for help from other parts of the judiciary).

[164] For example, *Osborne v. Goodlet*, No. M2003-03118-COA-R3-CV, 2005 WL 1713868, (Tenn. Ct. App. July 22, 2005), held that an assistant public defender was immune from suit for malpractice under either of two state laws. *But see* Barner v. Leeds, 13 P.3d 704, 705-14 (Cal. 2000) (holding that state public defenders are not immune from suit).

Appointed lawyers could be treated as the equivalent of volunteers, particularly where they are not paid for their services. Numerous jurisdictions immunized volunteers from liability. *See, e.g.*, ARK. CODE ANN. § 17-95-106 (West 2007) (creating immunity for volunteer retired physicians who provide services at low-cost medical clinics); LA. REV. STAT. ANN. § 9:2799.5 (Westlaw 2007) (providing immunity to health care providers who provide free services at community clinics); MD. CODE ANN., CTS. & JUD. PROC. § 5-425(b) (Westlaw 2007) (conferring immunity on professional engineers who, upon request of state officials, volunteer at the scene of an emergency, disaster, or catastrophic event); TEX. EDUC. CODE ANN. § 22.053 (Vernon 2007) (stating that a "volunteer who is serving as a direct service volunteer of a school district is immune from civil liability to the same extent as a professional employee of a school district"); W. VA. CODE ANN. § 55-7-19 (2007) (limiting liability of physicians who volunteer for certain athletic events sponsored by a public or private elementary or secondary school).

[165] *See, e.g.*, Mosier v. Ray Quinney & Nebeker, P.C., No. 2:06-CV-519, 2007 U.S. Dist. LEXIS 67599 (D. Utah Sept. 11, 2007) (barring an action by a corporate trustee against a law firm where the evidence left no doubt that the debtor's officers and directors engaged in willful misconduct).

[166] BLACK'S LAW DICTIONARY 808 (8th ed. 2004) (defining the Latin term *in pari delicto* as meaning "in equal fault").

position of the [defending] party . . . is the better one."[167] Put differently, "[i]n the familiar economic language of the Chicago School, among wrongdoers equally at fault the law ought not to redistribute losses caused by the wrong itself, but rather should leave the parties where it finds them."[168] Under the rule of *in pari delicto*, the "[s]uit is barred not because the defendant is right, but rather because the plaintiff, being equally wrong, has forfeited any claim to the aid of the court."[169]

The *in pari delicto* defense "is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality."[170] The effect of the *in pari delicto* doctrine is that generally "there is no recourse between wrongdoers."[171]

Numerous legal malpractice claims have been barred by the *in pari delicto* doctrine.[172] Generally, those cases have involved clients who lied to courts on their attorneys' advice. A client who has engaged in such knowingly wrongful conduct is typically barred from recovering damages in a malpractice action for losses that arise from the perjury.[173]

The doctrine of *in pari delicto* covers some of the same ground as the general wrongful conduct defense discussed above.[174] Thus, one court wrote simply, without reference to the defendant's degree of fault, that "[t]he doctrine

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[167] Marwil v. Cluff, 1:03-CV-0787-DFH-JMS, 2007 WL 2608845, at *7 (S.D. Ind. Sept. 5, 2007) (citation omitted). *See also* Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 158 (2d Cir. 2003) (interpreting the phrase quoted in the text as meaning "where the wrong of the one party equals that of the other, the defendant is in the stronger position").

[168] Pantely v. Garris, Garris & Garris, P.C., 447 N.W.2d 864, 867 (Mich. Ct. App. 1989).

[169] *Id.* at 867.

[170] Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306 (1985).

[171] Patten v. Raddatz, 895 P.2d 633, 635 (Mont. 1995) (barring a tort action arising from a long-term relationship involving drug use and prostitution).

[172] *See, e.g.*, Tillman v. Shofner, 90 P.3d 582, 584-87 (Okla. Civ. App. 2004) (holding that a claim against an attorney for legal malpractice was barred under the doctrine of *in pari delicto* where the damages allegedly suffered by the plaintiff client arose from a criminal conspiracy to defraud the Internal Revenue Service and the United States Bankruptcy Court, to which both the attorney and the client had pled guilty).

[173] *See, e.g.*, Turner v. Anderson, 704 So. 2d 748, 752 (Fla. Dist. Ct. App. 1998) (holding that the doctrine of *in pari delicto* barred a client's suit against attorneys who allegedly advised him to commit perjury); Pantely v. Garris, Garris & Garris, P.C., 447 N.W.2d 864, 868-69 (Mich. Ct. App. 1989) (holding that an attorney was not liable for legal malpractice in allegedly counseling a client to lie that she had lived in the county for at least ten days before her divorce complaint was filed, because the client was *in pari delicto*); Evans v. Cameron, 360 N.W.2d 25, 26-27 (Wis. 1985) (holding that *in pari delicto* barred a client from recovering from an attorney for damages allegedly suffered as a result of lying under oath in a bankruptcy proceeding, pursuant to the attorney's advice).

[174] *See supra* Part II.

of *in pari delicto* is the 'principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.'"[175]

As an aid to legal analysis, a carefully conceptualized wrongful conduct defense has two advantages over the doctrine of *in pari delicto*. The first is clarity and the second is focus. Courts recognizing a wrongful conduct defense (at least in tort cases not involving legal malpractice) often endeavor to be clear about what type of conduct gives rise to the defense and how closely that conduct must be related to the injuries for which the plaintiff seeks recovery.[176] The same has not always been true of courts applying the *in pari delicto* doctrine. Courts sometimes say that the doctrine is applicable to any case involving "an immoral or illegal transaction . . . [entailing] moral turpitude."[177] By referring to "immorality," those courts greatly and imprecisely expand the range of offending conduct that might trigger the defense and, by requiring "moral turpitude," they raise all of the issues and disagreements that have surrounded that phrase.[178] Moreover, the Latin name of the *in pari delicto* doctrine itself and the maxim quoted above[179] do little to enhance clarity in analysis or certainty in application.

More significantly, by focusing on whether the parties are "equally at fault," the *in pari delicto* doctrine misorients the analysis. The question is not whether the plaintiff is *equally* at fault with the defendant. Indeed, any rule

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[175] Reed v. Cedar County, No. 05-CV-64-LRR, 2007 WL 509186, at *4 (N.D. Iowa Feb. 12, 2007). *See also* Orzel by Orzel v. Scott Drug Co., 537 N.W.2d 208, 212 (Mich. 1995) (stating that "[w]hen a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, . . . the 'doctrine of *in pari delicto*' generally applies to also bar the plaintiff's claim").

[176] *See, e.g.*, *Orzel by Orzel*, 537 N.W.2d at 214-15. In *Orzel*, the court, incidental to a painstaking review of the facts, explained:

> The mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule. To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. Cases in which the wrongful-conduct rule has been applied include: . . . [an illegal lottery; trespass and gambling; illegal contract; murder; embezzlement; perjury; and arson].
>
> In contrast, where the plaintiff's illegal act only amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe work place, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule . . . .
>
> Another important limitation under the wrongful-conduct rule involves causation. For the wrongful-conduct rule to apply, a sufficient causal nexus must exist between the plaintiff's illegal conduct and the plaintiff's asserted damages . . . . *Id.* (internal citations omitted).

[177] *Tillman*, 90 P.3d at 584 (quoting Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936)).

[178] *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 92-93 (1986) (discussing the problem of defining "moral turpitude"). *See also* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.6 (c) (2d ed. 2007); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2 (c) (2008-09 ed.). *But see* Jordan v. De George, 341 U.S. 223 (1951); *In re* Calaway, 570 P.2d 1223 (Cal. 1977).

[179] *See supra* text accompanying note 167.

framed in terms of an equality requirement would be both rarely useful and the subject of frequent dispute. In only one in a hundred cases—the fifty-fifty case—will the plaintiff and defendant be *equally* at fault. If recovery were barred only in such instances, there would be endless litigation over whether the plaintiff and defendant were to blame to precisely the same extent. Yet this is generally not what modern courts[180] are looking for when they speak of *in pari delicto*. In some cases, what the courts mean is that the plaintiff's knowing participation in unlawful conduct was so serious and so closely connected to the damages for which recovery is sought that it is fair to foreclose recovery.[181] If that is so, it is far preferable to address those considerations (the seriousness of the plaintiff's conduct and its relationship to the plaintiff's harm) under an unlawful conduct defense that expressly incorporates those factors than by invoking the imprecise language of *in pari delicto*. In other cases, what the courts mean when they invoke the phrase *in pari delicto* is that the plaintiff was *more at fault* than the defendant. Thus, in one recent legal malpractice case, the court held that a claim against an attorney for negligence was barred by *in pari delicto* because the plaintiff had engaged in fraudulent conduct.[182] As the court explained, the claim was foreclosed from judicial consideration because "[t]he actual fraud of Mr. Gosman [the client] is *more objectionable* than the alleged negligence of Peabody [the attorney]."[183] Cases like this illustrate two points. First, it makes little sense to talk about the relevant defense in the language of "*in pari delicto*" if the question is not whether the plaintiff was equally at fault, but rather more at fault. Second, if a comparison between the fault of the parties is to be made, that inquiry may be better framed in the language of comparative

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[180] *But see* O'Halloran v. PricewaterhouseCoopers LLP, 969 So. 2d 1039, 1044 (Fla. Dist. Ct. App. 2007) (stating "[i]n its classic formulation, the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury, because 'in cases where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt'" (quoting 1 J. STORY, EQUITY JURISPRUDENCE 304-305 (13th ed. 1886)).

[181] *Cf.* Gage v. Network Appliance, Inc., No. B177657, 2005 WL 3214954 (Cal. Ct. App. Nov. 30, 2005). In *Gage*, the employees of the defendant deliberately got the plaintiff intoxicated, then interfered with a bartender's efforts to call a taxi to take him home. While driving away, the inebriated plaintiff was seriously injured in an accident which caused him to be convicted of vehicular homicide. There is language in the opinion saying that "Grant and Iversion's reprehensible conduct preceded plaintiff's *equally reprehensible* decision to drive home while intoxicated." *Id.* at *5. However, the court was more concerned with plaintiff's own serious unlawful conduct, than with parity of fault. The court wrote:

> [P]laintiff cannot escape responsibility for his own fault simply because . . . [the defendant's employees'] conduct was a concurrent cause of his injuries. Inasmuch as plaintiff was his own last line of defense and he was a cause of his own injuries, he cannot plead facts negating that his injuries were proximately caused by his commission of a felony.

Id. at *5. The court held that any action against the defendant was barred by the plaintiff's felony conviction. *Id.* at *5.

[182] *See In re* Gosman, 382 B.R. 826, 838 (S.D. Fla. 2007).

[183] *Id.* (emphasis added).

negligence or comparative fault than in terms of whether a total defense precludes recovery (regardless of whether that defense is called *in pari delicto*, unlawful conduct, or something else). The relationship between the wrongful conduct defense and comparative principles is discussed below.[184]

Courts recognizing the *in pari delicto* doctrine sometimes do not apply it because *the defendant* was more at fault than the plaintiff.[185] In those cases, the parties, in fact, are not *in pari delicto*, so it is not surprising that a defense so named is inapplicable. However, this line of reasoning finds less application in legal malpractice cases than one might expect.[186] If a client lies under oath[187] or

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[184] *See infra* Part IV.

[185] *See In re Gosman*, 382 B.R. at 838 (stating, in a legal malpractice action, that the doctrine of *in pari delicto* is inapplicable if the plaintiff's fault is far less in degree than the defendant's); Orzel by Orzel v. Scott Drug Co., 537 N.W.2d 208, 217 (Mich. 1995) (opining that "a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries," such as where the plaintiff has acted "under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age . . . ."); McKinley v. Weidner, 698 P.2d 983, (Or. Ct. App. 1985) (holding that a client was not equally at fault with an attorney where the client, on the attorney's advice, tendered a check with an intention to dishonor check as part of ploy to recover possession of a boat from a third party, and therefore the client's legal malpractice action was not barred by the doctrine of *in pari delicto*).

In *Hudson v. Craft*, 204 P.2d 1 (Cal. 1949), an 18-year-old participant in an illegal boxing match sued the promoter of the match for injuries he sustained. The court found that the boxing law, which required licensing and safety precautions, was intended to protect persons engaging in the activity from physical harm, rather than boxing promoters. Consequently, the plaintiff participant and the defendant promoter were not *in pari delicto*, and a suit against the promoter could be maintained, even though the plaintiff may have been criminally liable and might have been barred from suing another participant for injuries sustained. A similar line of reasoning could be developed in legal malpractice cases. Attorneys, it might be argued, have a greater obligation to ensure the integrity of the administration of justice than mere litigants, and that obligation is intended, at least in part, to protect litigants. Therefore, when a client, on an attorney's advice, lies to a court, it might be argued that the lawyer is more at fault than the client, and that a client's claim against the lawyer should not be barred in its entirety, even if recovery might be reduced to reflect the client's share of the fault.

[186] *See In re* Greater Se. Cmty. Hosp. Corp. , 353 B.R. 324, 369 (Bankr. D. Col. 2006) (rejecting an argument that law firm defendants sued for malpractice "ought not be allowed to invoke the *in pari delicto* defense because lawyers owe a special duty of care to their clients"). *See also* Abbott v. Marker, 722 N.W.2d 162, 166-67 (Wis. Ct. App. 2006) (rejecting, in the context of an illegal fee-splitting agreement between a non-lawyer and a lawyer, the argument that the parties to the agreement were not *in pari delicto*). *But see* Mrozek v. Intra Fin. Corp., 699 N.W.2d 54, 64 (Wis. 2005) (holding that a legal malpractice action was not barred on the ground that the plaintiff client was *in pari delicto* where the attorney had asserted before the Securities Commissioner that the client's actions were not illegal).

[187] *See* Pantely v. Garris, Garris & Garris, P.C., 447 N.W.2d 864, 868-69 (Mich. Ct. App. 1989) (finding attorney and client equally at fault); Evans v. Cameron, 360 N.W.2d 25, 26-27 (Wis. 1985) (same); *see also* Choquette v. Isacoff, 836 N.E.2d 329, 334-35 (Mass. App. Ct. 2005) (similar).
In *Pantely*, the court wrote:

files a false affidavit[188] based on an attorney's advice, courts are generally disinclined to inquire into whether the attorney was more at fault than the client.[189] Rather, the courts seem to be influenced more by the plaintiff's serious unlawful conduct and its connection to the plaintiff's conduct, than by the extent of the defendant's own blameworthiness.[190] If that is true, it would be preferable to consider the issue in terms of a clearly articulated unlawful conduct defense, rather than under the clumsy language of *in pari delicto*.

C. Unclean Hands

A number of cases have held that a legal malpractice claim may be barred by the doctrine of unclean hands. Some of these decisions have involved clients who committed perjury based on an attorney's advice.[191] Others have arisen

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> First, Ms. Pantely denies she is equally at fault . . . . After all, she says, she lied at the direction of her attorneys at a time when she was emotionally distraught and desperate to secure a divorce. In sum, she contends . . . that her wrongdoing is less reprehensible than that of her lawyers.
>
> We can readily envision legal matters so complex and ethical dilemmas so profound that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault. But perjury is not complex; and telling the truth poses no dilemma . . . . More pointedly, it is a crime. . . . A law degree does not add to one's awareness that perjury is immoral and illegal, any more than an accounting degree adds to one's awareness that tax fraud is immoral and illegal.

447 N.W.2d at 868. *But see* Berman v. Coakley, 137 N.E. 667, 670 (Mass. 1923) (noting that an "attorney and client do not deal with each other at arm's length" and that the "client often is in many respects powerless to resist the influence of his attorney," and holding, in an action involving an illegal contract, a lawyer and client were not *in pari delicto*).

[188] *See* General Car & Truck Leasing Sys., Inc. v. Lane & Waterman, 557 N.W.2d 274 (Iowa 1996) (finding client and law firm equally culpable).

[189] *See, e.g.*, Tillman v. Shofner, 90 P.3d 582, 585 (Okla. Civ. App. 2004) (rejecting a client's argument that "she was not quite as guilty" as her attorney with respect to a scheme to defraud the government). *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 29 cmt. a (2000) (stating that "[a] client involved in litigation might seek to avoid a sanction on the ground that counsel rather than the client has been to blame for a default . . . . [In this situation,] tribunals are often reluctant to let a client escape responsibility but will nevertheless consider evidence to that effect"). *But see* In re Almasri, 378 B.R. 550, 556 (Bankr. N.D. Ohio 2007) (declining to grant an attorney's motion to dismiss because it was not clear that the debtor was "at least as culpable" as the debtor's counsel, if the allegation in the complaint were true).

[190] *Cf.* Butler v. Mooers, 771 A.2d 1034, 1036-37 (Me. 2001). In a legal malpractice case where the *in pari delicto* defense was asserted, the court focused on a causation rationale for denying recovery; "even if we assume that Mooers negligently provided Butler with inaccurate legal advice, Butler's plea of guilty and his acknowledgment that he 'knowingly and willfully' defrauded the banks precludes a finding that his criminal conduct was nonetheless proximately caused by Mooers' negligent legal advice." *Id.*

[191] *See* Blain v. Doctor's Co., 272 Cal. Rptr. 250, 258-59 (Cal. Ct. App. 1990) (holding that the doctrine of unclean hands barred a physician's legal malpractice claims for emotional distress and loss of the ability to practice medicine); Kirkland v. Mannis, 639 P.2d 671, 673 (Or. Ct. App. 1982) (holding that where a client and attorney "cooperatively presented a perjurious tale" at the client's trial, a malpractice claim against the attorney was barred by the doctrine of unclean hands).

from very different contexts. In one case, a lender who had previously been found liable for a violation of the state Interest Act in a suit commenced against him by a borrower was precluded from litigating a claim that his violation resulted from incorrect advice provided to him by his attorney.[192] The court found it irrelevant that the earlier case did not involve fraud because the relevant principle was that "courts do not aid parties whose causes of action are founded on *any* illegal or immoral acts, including the violation of a statute, to assert rights growing out of such acts or to relieve themselves of the consequences of those acts. . . ."[193] This formulation of an unlawful conduct bar to legal malpractice liability is exceptionally broad and creates an unreasonable and unnecessary risk that relief will be foreclosed in a range of cases far wider than is appropriate. Throughout the law of torts, a statutory violation by the plaintiff, even if proximately causing the plaintiff's injuries, is normally not a total bar to relief, but only an obstacle to recovery to the extent provided by applicable principles of comparative negligence or comparative fault.[194] "Immoral" conduct that is not a violation of legislative or common-law rules is not a defense at all. And whether recovery is permitted or foreclosed is determined by reference to well-developed principles of proximate causation, not whether the rights asserted "grow out of" particular acts.

Applying the doctrine of unclean hands to legal malpractice cases is not a useful path of analysis for at least two reasons. First, unclean hands is an equitable defense that properly has no application when legal relief, such as a request for damages, is an issue.[195] Second, the rubric of "unclean hands" obfuscates the issue of just what type of conduct gives rise to the defense or how closely that conduct must be connected to the relief being sought in order for the action to be barred. The better path is to forego the opaque language of "unclean hands" and engage in a careful analysis of the facts in light of a clearly articulated unlawful conduct defense.

Kirkland's reliance on unclean hands was disavowed by a later case which preferred to analyze the case under the nomenclature of *in pari delicto*. *See* McKinley v. Weidner, 698 P.2d 983, 985-86 (Or. Ct. App. 1985).

[192] *See* Buttitta v. Newell, 531 N.E.2d 957, 960-61 (Ill. Ct. App. 1988).

[193] *Id.* at 961.

[194] *See generally* RESTATEMENT (THIRD) OF TORTS § 14 (2005) (discussing statutory violations as negligence per se).

[195] *See* DAN B. DOBBS, THE LAW OF REMEDIES 68 (2d ed. 1993) ("The most orthodox view of the unclean hands doctrine makes it an equitable defense, that is, one that can be raised to defeat an equitable remedy, but not one that defeats other remedies"). Malpractice actions often include claims for disgorgement of fees, as well as claims for damages. *See* Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 625-35 (2002) (discussing fee forfeiture claims). Disgorgement is an equitable remedy that might, at least theoretically, be defeated by the unclean hands doctrine.

D. Insider Fraud

Malpractice actions by business entities or their successors in interest have sometimes been barred by what is called the "insider fraud defense."[196] In these cases, the question is whether it is fair to impute the fraudulent conduct of entity constituents, such as officers or employees, to the entity itself or its successor. A complex body of law has evolved relating to these issues.[197] A number of exceptions to the general principle of imputation have been recognized. Thus, when a constituent acts adversely to the entity, the entity will not be barred from pursuing a malpractice claim by the fraudulent conduct of the constituent.[198] In these cases, the unlawful conduct defense fails even though fraud was committed.[199] However, if the fraudulent conduct of the agent is imputable to the principal, the defense can be asserted, because fraud is uniformly regarded as a serious form of unlawful conduct. Some of the cases addressing the issue of whether insider fraud will be imputed to an entity or successor in interest to bar a legal malpractice claim address the issue within the rubric of the *in pari delicto* doctrine.[200]

E. Lack of Proximate Causation

It is possible to speak of the plaintiff's unlawful conduct not as an affirmative defense to be pleaded and proved by the defendant, but as an obstacle to the plaintiff's proof of a prima facie case of liability. For example, *Shahbaz v.*

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[196] *See also* Cobalt Multifamily Investors I, L.L.C. v. Shapiro, No. 06 Civ. 6468(KMW)(MHD), 2008 WL 833237, at *4 (S.D.N.Y. Mar. 28, 2008) (holding that a receiver's claims against law firm defendants were based on allegations that they assisted the individual defendants in committing fraud, and therefore the receiver could not assert those claims, whether framed as legal malpractice or otherwise).

[197] *Cf.* O'Halloran v. PricewaterhouseCoopers L.L.P., 969 So. 2d 1039, 1044-46 (Fla. Dist. Ct. App. 2007) (offering an extensive discussion of imputation principles in the context of accounting malpractice).

[198] *See* Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709 (Bankr. S.D.N.Y. 2001) (discussing the "adverse interest exception" to the fraudulent conduct imputation rule). *See also* O'Melveny & Myers v. F.D.I.C., 512 U.S. 79, 84 (1994) (holding, in a legal malpractice action, that state law, not federal law, governs the imputation of knowledge to corporate victims).

[199] *Cf. In re* Hampton Hotel Investors, L.P., 289 B.R. 563, 578 (Bankr. S.D.N.Y. 2003) (finding that an allegation of facts within the terms of the adverse interest exception to the fraudulent conduct defense prevented dismissal of claims against a law firm). *See also In re* Fuzion Technologies Group, Inc., 332 B.R. 225, 236-37 (Bankr. S.D. Fla. 2005) (finding that even if the *in pari delicto* defense applied to a bankruptcy trustee, under Florida law it remained unavailable to the defendant law firm because the CEO's intentional misconduct could not be imputed to the debtor). *But see In re* Dublin Securities, Inc., 133 F.3d 377, 380 (6th Cir. 1997) (holding that the doctrine of *in pari delicto* was properly applied to preclude trustee from pursuing legal malpractice claims).

[200] *See, e.g., In re* Scott Acquisition Corp., 364 B.R. 562 (Bankr. D. Del. 2007) (holding that a legal malpractice action was barred because the adverse interest exception to the *in pari delicto* defense did not apply).

Horwitz[201] held that a client who was found guilty of fraud in a civil suit could not successfully maintain a negligence action against the law firm that had assisted him in the fraudulent transaction, because the proximate causation element of a malpractice claim includes "determining cause in fact and considering various policy factors that may preclude imposition of liability."[202] The court reasoned that just as "an intentional tortfeasor cannot obtain contribution from a negligent joint tortfeasor"[203] and "a party [cannot] obtain indemnity or insurance for intentional wrongdoing,"[204] so too "[p]ublic policy forbids intentional tortfeasors . . . from shifting their liability for intentional wrongdoing to their negligent attorneys."[205] Although the court acknowledged that "[o]ther states have barred intentional wrongdoers from bringing malpractice actions against negligent attorneys under the doctrine, *in pari delicto*,"[206] it found that the defendants' "contentions reduce[d] to an attack on proximate causation."[207]

In framing the issue in causation terms, the *Shahbaz* court followed essentially the same path that states have taken in holding that plaintiffs must prove exoneration or innocence when alleging negligence in the context of criminal representation. It viewed the critical issue as one of causation and adopted a rule that effectively insulates an entire class of attorneys from liability for malpractice, namely those attorneys who represent persons ultimately found liable for fraud.[208] As with the exoneration or innocence requirements that apply in suits against criminal defense attorneys, it is possible to ask whether this line of analysis in cases involving client fraud results in doctrinal overkill.

IV. COMPARATIVE PRINCIPLES AND THE FUTURE OF THE UNLAWFUL CONDUCT DEFENSE

As Parts II and III demonstrate, commission of unlawful conduct closes the courthouse doors to plaintiffs in a broad range of cases involving tort claims in general and legal malpractice claims in particular. Thus, today the law is considerably different than when the first and second Restatements[209] rejected an outlaw doctrine and announced that the mere commission of a crime or tort did

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[201] No. G037299, 2008 WL 808034 (Cal. Ct. App. March 27, 2008).
[202] *Id.* at *9 (quoting Viner v. Sweet, 70 P.3d 1046, 1048 n.1 (Cal. 2003)).
[203] *Id.* at *10 (citation omitted).
[204] *Id.*
[205] *Id.* at *9.
[206] *Id.* at *10 n.9.
[207] *Id.* at *9.
[208] A person convicted of crime may rebut the presumption that the crime, not the lawyer's malpractice, caused the resulting harm by proving exoneration of the crime and, in some states, innocence. *See supra* Part III.A. Similarly, the *Shahbaz* court allowed the possibility that, not withstanding a fraud judgment, the public policy obstacle to proof of proximate causation may be overcome if the plaintiff establishes that he or she was an "innocent principal." 2008 WL 808034, at *11. However, the court found that exception inapplicable to the facts of the case.
[209] *See supra* Part I.

not bar one from recovery for interference with legally protected interests. Yet, perhaps the difference is less significant than it might first appear.

The recent emergence of an unlawful conduct defense in American tort law is, in a sense, a restoration of the balance struck, on other grounds, during much of the twentieth century regarding the availability of compensation for negligence.[210] Even as the first[211] and second[212] Restatements rejected an outlaw doctrine, they held that a plaintiff's unlawfully tortious or criminal conduct could give rise to the defense of contributory negligence.[213] Until roughly the early 1970s, contributory negligence was a total defense to a negligence claim in most jurisdictions.[214] Thus, recognition of an unlawful conduct defense today in negligence cases dictates the same result that was often reached under the contributory negligence doctrine in the age of pre-comparative principles. In either case, a plaintiff suing in negligence to recover for injuries to which the plaintiff's own serious unlawful conduct contributed is barred from receiving compensation.[215]

Nevertheless, the widespread endorsement of comparative negligence and comparative fault in forty-six states[216] cannot be ignored. The substitution of proportionality principles[217] for the earlier all-or-nothing rule of contributory

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[210] *See* Flanagan v. Baker, 621 N.E.2d 1190, 1192 (Mass. App. Ct. 1993), which stated:

> "It has been established from early times that one who is violating a criminal statute cannot recover for an injury to which his criminality was a directly contributing cause." . . . . These cases proceed on the basis that violation of a criminal statute is evidence of negligence "in reference to matters to which the statute relates." . . . . It logically follows that, where contributory negligence is recognized as a defense in a negligence action, such evidence results in a bar to recovery. (Internal citations omitted).

[211] *See* RESTATEMENT (FIRST) OF TORTS § 889 (1939).

[212] *See* RESTATEMENT (SECOND) OF TORTS § 889 (1979).

[213] *See id.* at § 889 cmt. b (stating that "[c]riminal conduct that . . . constitutes negligence or recklessness . . . is a defense to an action for harm caused by corresponding negligence or recklessness of another").

[214] *See id.* § 467 (stating that "[e]xcept where the defendant has the last clear chance [to avoid harm], the plaintiff's contributory negligence bars recovery. . . .").

[215] Of course, an unlawful conduct defense can be asserted in a suit alleging not that an attorney acted negligently, but engaged in intentionally tortious conduct, such as fraud. Prior to the adoption of comparative law principles, a contributory negligence defense could not be raised in such a case and would not have barred recovery. If the same result is true today, the strongest argument for that conclusion is that an attorney should not be permitted to engage in deliberate victimization of a person engaged in unlawful conduct. The contrary argument would be that the parties, having both knowingly committed unlawful acts, are *in pari delicto*, and that the court should leave them where it finds them and deny relief to the plaintiff. *See supra* Part III.B.

[216] Only four states and the District of Columbia retain strict common-law contributory negligence: Alabama (Bergob v. Scrushy, 855 So. 2d 523 (Ala. Civ. App. 2002)); D.C. (Wingfield v. Peoples Drug Store, Inc., 379 A.2d 685, 687 (D.C. 1977)); Maryland (Pippin v. Potomac Electric Power Co., 132 F. Supp. 2d 379, 383 (D. Md. 2001)); North Carolina (Yancey v. Lea, 532 S.E.2d 560, 563 (N.C. Ct. App. 2000)); and Virginia (Litchford v. Hancock, 352 S.E.2d 335, 337 (Va. 1987)).

[217] *Cf.* Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 938 n.53 (2004) (explaining that "[u]nder a 'pure' comparative [negligence or comparative fault]

negligence ranks as the most important development of the field of tort law in the last hundred years.[218] Today, in a wide range of situations, the law favors the view that liability should not only be based on fault, but limited in proportion to fault.[219] In that respect, the emergence of an unlawful conduct defense that is a total bar to recovery is out of step with the strongest trend in modern American tort law because it ignores fault on the part of the defendant and focuses wholly on the fault of the plaintiff. Such an approach to issues of lawyer liability is infirm because the law should embrace rules that create an incentive for both the defendant (the lawyer) and the plaintiff (the client or third person) to exercise care to avoid losses that could be minimized through lawful and otherwise appropriate conduct.[220] Courts should be reluctant to expansively create doctrines–such as some versions of the modern unlawful conduct defense–which abrogate state comparative law schemes.[221]

There is legitimate concern—at least within the legal profession—about the tendency in contemporary American society for clients to seek to hold their

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system, damages are allocated in proportion to fault. The same is true under a 'modified' comparative system if the plaintiff is less at fault than the defendant(s). However, if the plaintiff is more at fault than the defendant(s) in a 'modified' comparative system, the plaintiff recovers nothing, in which case damages are not allocated in proportion to fault.").

[218] *Cf.* JOHNSON & GUNN, *supra* note 14, at 798 (discussing the doctrinal implications that arose once "contributory negligence began to be supplanted by comparative principles").

[219] *See id.* at 7 ("The proportionality principle seeks to limit or refine application of the fault principle. In part, it holds that liability should not be levied on an individual tortfeasor, even if fault is shown, if doing so would expose the defendant to a burden that is disproportionately heavy or perhaps unlimited."). *See also* Li v. Yellow Cab Co., 532 P.2d 1226, 1230-31 (Cal. 1975) (stating that the contributory negligence doctrine "is inequitable in its operation because it fails to distribute responsibility in proportion to fault . . . . [I]n a system in which liability is based on fault, the extent of that fault should govern the extent of liability"). In states with "pure" comparative negligence or comparative fault, the proportionality principle is given its greatest recognition. In states with "modified" comparative negligence or comparative fault, the proportionality principle is accorded precedence within a limited scope. In those states, if the plaintiff's contribution to the production of the harm falls short of the 50% threshold, proportional recovery is allowed. If the plaintiff's contribution exceeds the 50% threshold, no recovery is permitted, in which case the proportionality principle is trumped by other considerations, including the principle that the persons should exercise individual responsibility to protect their own interests. States with "modified" systems differ as to whether they allow proportional recovery or deny recovery in cases where the allocation of fault between the plaintiff and defendant(s) is fifty-fifty.

[220] *Cf.* JOHNSON & GUNN, *supra* note 14, at 7 (discussing the idea that liability should be imposed to deter unnecessary losses).

[221] *See* Alami v. Volkswagen of America, Inc., 766 N.E.2d 574, 577 (N.Y. 2002) (opining that the New York common-law unlawful conduct defense "embodies a narrow application of public policy imperatives under limited circumstances" and that it did not bar a products liability claim against a car manufacturer by the estate of an intoxicated motorist who died in a crash because so holding "would abrogate legislatively mandated comparative fault analysis in a wide range of tort claims"). *But see* Saks v. Sawtelle, Goode, Davidson & Troilo, P.C., 880 S.W.2d 466, 471 (Tex. App. 1994) (holding that because the "appellants' causes of action against appellees . . . [were] barred by public policy, and are therefore invalid," those causes of action could not be presented to a trier of fact and, "consequently, an analysis of comparative fault [was] not necessary").

lawyers responsible for whatever losses flow from the clients' endeavors.[222] The legal rules that govern such actions—including the law of negligence and fiduciary duty principles—sometimes make it too easy for plaintiffs to state a cause of action and raise triable issues of fact that will be decided by a jury. The most disturbing claims may be those brought by clients who themselves, either personally or through their representatives, have engaged in serious criminal conduct. Allowing such claims to give rise to malpractice liability inevitably raises the cost of legal services for other, law-abiding clients, since those losses are typically spread by lawyer-defendants, through malpractice insurance or otherwise, as a cost of doing business. One way to guard against these claims and related costs is by asserting that recovery is barred by the plaintiff's own unlawful conduct.

In deciding whether and to what extent an unlawful conduct defense should foreclose otherwise viable theories of compensation, courts must balance a number of important considerations. The path chosen by the courts must encourage lawful conduct and personal responsibility;[223] prevent persons from profiting from wrongful conduct;[224] create appropriate incentives for the exercise of care by professionals;[225] protect clients and others from attorney wrongdoing;[226] and embrace rules that are sufficiently clear and administratively

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[222] *Cf.* Katarina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 135 (2008) (discussing the "recent trend of suing lawyers using every possible legal theory").

[223] *See* JOHNSON & GUNN, *supra* note 14, at 9 (discussing the policy of encouraging personal responsibility).

[224] It is important for courts to scrutinize carefully a defendant's claims that, if permitted to recover damages in a tort action, the plaintiff will profit from his or her own wrongdoing. One case where the court exercised such scrutiny was *Boruschewitz v. Kirts*, 554 N.E.2d 1112 (Ill. App. Ct. 1990). In *Boruschewitz*, an outpatient of a mental health center shot and killed two persons. In holding that the claims by the outpatient and her husband against the center and a physician were not barred by the fact that the outpatient had been criminally prosecuted and found guilty but insane, the court wrote:

> While the statutes and cases cited to this court are premised upon the principle that a person should not benefit from his illegal act, we find this principle to be inapplicable in the case at bar. The plaintiffs in this case are not attempting to profit from an illegal act. Plaintiffs are seeking *compensation* for damages they allegedly suffered; they are not attempting to *profit*. If plaintiffs can prove the allegations set forth in their amended complaint, they will be made whole again; they will not receive "profit."

Id. at 1115. Of course, the mere absence of profit does not mean that there are no good reasons for finding a wrongful conduct defense applicable to a given set of facts. *See* Orzel by Orzel v. Scott Drug Co., 537 N.W.2d 208, 213 n.9 (Mich. 1995) (opining that the wrongful conduct rule is not restricted to cases in which the plaintiff has profited from illegal conduct and that damages resulting from addiction were not recoverable from a pharmacy because the claim was based, at least in part, on the drug user's own illegal conduct).

[225] *Cf.* Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 RUTGERS L.J. 655, 668-73 (2007) (discussing the role of litigation in creating incentives for good practices).

[226] *Cf.* LEGAL MALPRACTICE LAW, *supra* note 66, at 51 (noting that "[c]lients are often ill-equipped to bargain with professionals for appropriate levels of protection").

convenient that they can be applied fairly and can encourage the resolution of claims, either in the courts or via settlement negotiations or other alternative dispute resolution mechanisms.[227]

The most desirable course is one that steers clear of extremes. Unlawful conduct by malpractice plaintiffs should not be overlooked, nor should it be too ready disqualifying from judicial recourse. The courthouse doors should be closed only if the plaintiff's unlawful conduct is so serious, so well established, and so closely connected to the injuries for which the plaintiff seeks compensation that the petition for relief should wholly be rejected because sound public policy demands it.

Mindful of these considerations, future development of the unlawful conduct defense should be guided by the following principles:

First, legislation creating an unlawful conduct defense should be treated as inapplicable to legal malpractice[228] lawsuits unless the legislation manifests a clear intent, by its text or legislative history, that the law is intended to govern issues of lawyer liability.[229] This approach will ensure that statutes drafted for other purposes–typically to govern relationships neither consensual nor fiduciary in nature–do not undermine the fiduciary principles and related public policies[230] that play an important role in most legal malpractice actions.

Second, in addressing whether a plaintiff's unlawful conduct bars recovery in a legal malpractice action, courts should refrain from using nebulous or ill-structured concepts, such as the *in pari delicto* rule or unclean hands doctrine, and should instead employ a carefully articulated unlawful conduct defense, which clearly specifies its elements and places the burden of proof on the defendant. This will avoid misunderstandings as to what must be proved and who must prove it. Placing the burden on the defendant will also avoid premature foreclosure of redress in the courts by making clear that there is no presumption that judicial consideration of malpractice claims is barred.

Third, only the most serious forms of unlawful conduct, knowingly committed by the plaintiff, should suffice as the predicate for an unlawful conduct defense in a legal malpractice action. The plaintiff's commission of

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[227] *See* JOHNSON & GUNN, *supra* note 14, at 9 (discussing the policy that tort rules should be "administratively convenient and efficient, and should avoid intractable inquiries").

[228] The term "legal malpractice" is used here in its broad sense and includes suits against lawyers by both clients and nonclients.

[229] A similar approach has been taken in the field of lawyer confidentiality. Authorities argue that state reporting statutes imposing a duty on "any person," but not expressly referring to lawyers, do not supersede the fiduciary obligations of lawyers to maintain confidentiality of client information. *See generally* NATHAN CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION (3d ed. 2005).

[230] Suits by nonclients against lawyers typically do not allege breach of fiduciary duty, but are animated by other important public policies, including, in some cases, a need to maintain the honor of the legal profession. *Cf. In re* Conduct of Hiller, 694 P.2d 540, 544 (Or. 1985) (opining that " A person must be able to trust a lawyer's word as the lawyer should expect his word to be understood, without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches.").

fraud, perjury, or another grievous felony would readily fall within this category. Many other forms of bad conduct, even if violative of a statute or in some sense immoral, will fall short of this demanding standard. This is appropriate, for the law should be reluctant to label one an outlaw unfit to seek redress in the courts. Of course, the plaintiff's knowing commission of serious unlawful conduct must be convincingly proven, either by prior adjudication in a criminal or civil proceeding, or in the legal malpractice action itself. In the latter case, a preponderance of the evidence standard of proof would seem to be appropriate because many affirmative defenses, including ones based on the plaintiff's conduct, such as comparative negligence or comparative fault, are adjudicated on that basis.

Fourth, the plaintiff's knowing commission of serious unlawful conduct should be a total defense to liability only if that conduct is *both* a factual *and* proximate cause of the plaintiff's injury, judged according to ordinary tort principles. To satisfy the demands of factual causation, the plaintiff's conduct must have been such a substantial factor that it made an indispensable contribution to the production of the harm (*i.e.*, was a but-for cause)[231] or was independently sufficient to cause that harm regardless of whether the lawyer acted improperly (*i.e.*, must fall within the well-recognized multiple-causation exception to the but-for rule).[232] Further, to meet the requirements of proximate causation, the harm for which the plaintiff seeks recovery must have been a foreseeable result or a direct consequence of the plaintiff's unlawful conduct.[233]

Finally, in cases not meeting the demanding requirements of the unlawful conduct defense, outlined above–(1) serious unlawful conduct, (2) knowingly committed, that is a (3) factual and (4) proximate cause of the plaintiff's harm–conduct of the plaintiff that is otherwise immoral or illegal should be treated as a defense only to the extent that it constitutes a form of contributory or comparative negligence or assumption of the risk. The effect of such a finding would then be determined by the rules of the jurisdiction governing contributory negligence, comparative negligence, or comparative fault.

The legal system is ill-served by the recent rush to broadly impose innocence or exoneration requirements on plaintiffs alleging malpractice in criminal representation and by the continued judicial application of hazy and poorly structured concepts, such as the *in pari delicto* and unclean hands doctrines, in actions against attorneys. It is appropriate and necessary for courts to embrace a clearly articulated unlawful conduct defense in legal malpractice cases under terms that foreclose judicial redress only in a narrow range of cases where the plaintiff's unlawful conduct is serious, knowingly committed, and

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[231] *See generally* RESTATEMENT (THIRD) OF TORTS § 26 (P.F.D. No. 1 2005) (discussing the basic test for factual causation).

[232] *See generally id.* at § 27 (discussing multiple sufficient causes).

[233] *See* JOHNSON & GUNN, *supra* note 14, at 420-23 (discussing the direct causation and foreseeability approaches to proximate causation analysis). An alternative test is a requirement that the injurious result must have been one of the risks that made the actor's conduct tortious. *See* RESTATEMENT (THIRD) OF TORTS § 29 (2005) (discussing limitations on liability for tortious conduct).

closely tied by principles of factual and proximate causation to the injuries for which the plaintiff seeks to recover damages.